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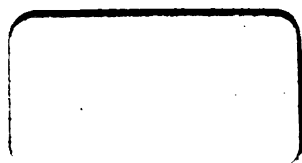
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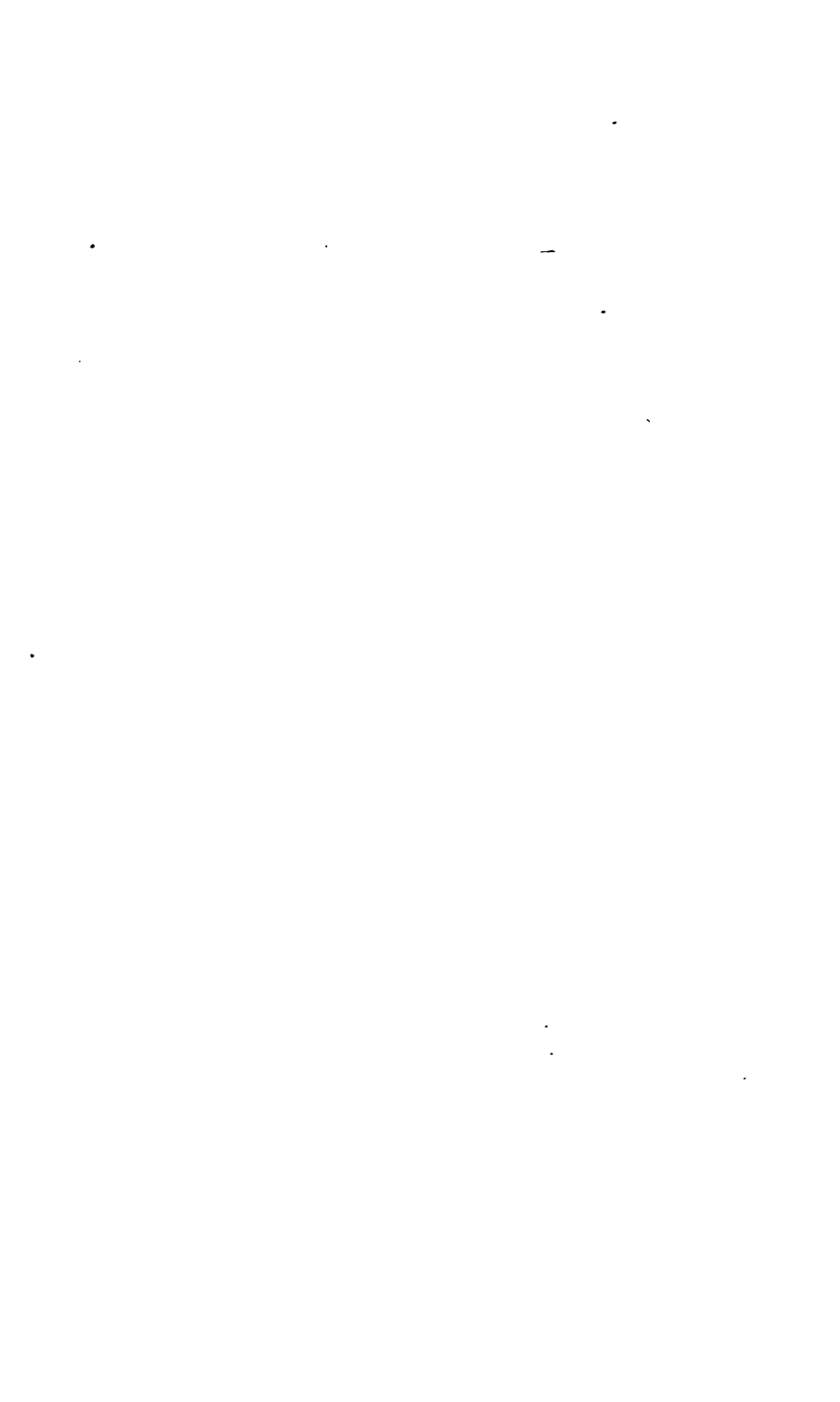
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AND

SCOTTISH LAW MAGAZINE.



Editorial.

Bankruptcy Examinations in Glasgow.—At a criminal trial a few weeks ago, if the daily newspapers of 8th December can be trusted, Sheriff Spens distinguished himself by a bare-faced attempt to keep his chariot balanced, while he was driving it through the Bankruptcy Act, 1856. By the 92nd section of this Act, "the examination of the bankrupt," except in certain cases, "*shall* take place before the Sheriff." The exceptions (sec. 88) are where the bankrupt is in gaol, and the Sheriff cannot attend there, or where the bankrupt cannot attend or is abroad. At the criminal trial in question, Sheriff Murray was put in the box, and the agent for the defence very properly addressed some questions to him to elicit the fact whether the above statute had been complied with. Sheriff Spens, who was the presiding judge, interposed, and appears somewhat imperiously to have laid down *his* view of the law, which was certainly not that of the statute. The Glasgow practice is notorious, and we are surprised that this wealthy mercantile community has stood the practice so long. The Sheriffs are in the habit of taking proofs in ordinary actions in their own chambers, while in the adjoining room a bankruptcy examination is proceeding conducted by the trustee and agents, while the Sheriff attends only occasionally to administer the oath to the bankrupt, and quell any disturbance, when the competency of a particular question cannot

be settled by wrangling. If a single creditor raises an action against his debtor for £20 the Sheriff hears the evidence in person, but if a score of creditors are investigating the affairs of a debtor who has failed for £20,000, the investigation may be left to the above risks. The excuse is that the Sheriffs have no time otherwise to overtake their work. But they might as well have debates proceeding in one or more rooms with the aid of phonographs, and so each Sheriff could be disposing of three or more cases simultaneously! We have a lively recollection of the fate of the unfortunate J.P. who followed another Glasgow practice of dispensing with the oath in taking the affidavits of creditors; and we trust some enterprising agent will call the attention of the Supreme Court to the above grossly loose practice. If there are too few Sheriffs in Glasgow, the remedy is not to be found in evading statutes, or overworking the local judges; but a remedy must be devised by the public and the Government.



IN connection with this case attention should be drawn to the decision and observations of the judges in an English case where the facts were identical. In *The Queen v. Lloyd* (Crown Cases Reserved), Q. B. Div. xix. 213, "the prisoner was convicted of perjury alleged to have been committed in an examination by 'the Court,' under sec. 27 of the Bankruptcy Act, 1883. It appeared that he was summoned under sec. 27 before a County Court having jurisdiction in bankruptcy. The oath was administered to the prisoner in court by the registrar. The registrar remained in court. The examination of the prisoner, in the course of which the answers in question were given, took place in a room used for examinations, in the absence of the registrar. *Held*, that there had been no valid examination by 'the Court' within sec. 27, and that the conviction must be quashed." The judges (Coleridge, C. J.; Denman, J.; Pollock, B.; Hawkins and Stephen, JJ.), in giving their opinion, all emphatically denounce the practice. The Lord Justice says, "What has been called his (registrar's) legal presence is his actual absence. . . . As to the practice which has been invoked, it is most reprehensible, and should at once and for ever be

discontinued." Mr. Justice Stephen says, "The conviction must obviously be quashed. As to what we have been told about the necessity for more registrars, I can only say that it is a very bad form of economy to allow important judicial duties to be inefficiently discharged. It should be clearly understood that evidence taken under such circumstances is not evidence at all." There is, moreover, the Scottish case of *Hastie* (4 Irvine, 389), which has been perhaps overlooked by the Sheriff. This involved the same question. Lord Neaves, though there was a motion to that effect, did not withdraw the case from the jury, but directed "that it was for them to consider whether it was sufficiently certain that the portions of the oath said to be false had been recorded exactly as emitted by the panel. The presence of the Sheriff afforded the statutory guarantee that the record of the oath expressed the exact meaning of the witness. Here that safeguard was wanting, and it might be that the person who took down the oath had not precisely appreciated the meaning of the witness." The jury acquitted.

* * *

Jurisdiction over English Executors of Scots Trustees.—In the case of *Trotters v. Moorsom and others*, the beneficiaries under a Scots marriage contract sought to recover a sum of £2000 lent as heritable security in Scotland by the marriage contract trustees, and alleged to have been lost owing to the insufficiency of the security. The ground of the claim was the trustees' neglect and breach of duty. When the action was raised the two trustees in office at the date of the unfortunate investment were both dead, and the defenders called were their respective executors. Of the two deceased trustees, one was a Scotsman, and the other an Englishman by origin and domicile. The executors of the latter were all domiciled Englishmen, and the whole estate administered by them (under an English probate) was English. They stated in defence a plea of no jurisdiction. Lord Kincairney has decided that this plea is well founded. The case presents an interesting contrast to the case of *Kennedy*, 12 R. 275, and *Robertson's Trustee*, 15 R. 914. The gist of these decisions was that the Scottish Court has jurisdiction over a domiciled

Englishman who is trustee in a Scottish trust in an action regarding his conduct of that trust. *Qua* domiciled Englishman he might be beyond the reach of Scottish jurisdiction; but *qua* trustee in a Scottish trust he was held to come within it. The *ratio decidendi* was found, not in the fact of domicile, but in the situation of the trust funds, the trustees being liable to account for their administration in the Courts of the country where the obligation to account is to be fulfilled, and where the trust is to be executed. The question raised by *Trotters'* case was whether or not the jurisdiction which the Court of Session would undoubtedly have had over the deceased trustee—albeit a domiciled Englishman—could be extended so as to include also his English executors, who would, of course, be liable to make good out of the deceased's estate in their hands any loss to the trust funds of the marriage contract, which might be found by the proper Court to have been caused by the deceased's neglect or breach of duty, even though they themselves had not been in any way connected with the affairs of the marriage contract trust. It was maintained that the trustees' obligation to account was one and indivisible, that convenience pointed strongly to the extension of Scottish jurisdiction in such a case, and that if the deceased trustees' executors had taken confirmation in Scotland as well as probate in England, the case of the *Mags. of Wick v. Forbes*, 12 D. 299, would have been conclusive authority against the plea of no jurisdiction; further, that the duty of restitution falling upon the deceased trustees' executors related entirely to the affairs of a Scottish trust and to a delict committed in Scotland, the consequences of which must be determined in accordance with the principles of Scots law and should be enforced in a Scottish Court. But Lord Kincairney found himself unable to extend the principle of *Kennedy v. Robertson's Trustee* so as to embrace persons who had not assumed the character of trustees in a Scottish trust with its attendant liabilities, or to refer to the consideration of *forum conveniens* as all that could enter into the determination of the *forum competens*, and based his decision on the authority of *Reoch v. Rob* (*Rob v. M'Lachlan*), 9 S. 588, referred to and approved in *Cameron v. Chapman*, 16 S. 907; and *Mackenzie v. Drummond's Executors*, 6 M'P. 932.

Extradition and Political Offences.—A nice point regarding the interpretation of the words "offence of a political character" in the Extradition Act of 1870 was decided by the Queen's Bench Division the other day, in a case which we report this month. We have heard much at home recently as to fine and hair-splitting distinctions between political offences and ordinary felony, but the facts of this case are broadly distinguishable from those to which our attention has been called at home. Section 3 of the said Act provides that "a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the Court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character." By the Extradition Treaty between Great Britain and Switzerland, amongst the crimes for which extradition is to be allowed, are murder and manslaughter; but Article XI. incorporates into the Treaty the said provision of Section 3 of the Act of 1870. The prisoner, Castioni, was a subject of Ticino, one of the confederated Swiss Cantons. The Constitution of Ticino provides that, should a petition signed by 7000 franchised citizens be presented demanding a revision of the Constitution, the Government shall within a month take a vote of the people as to whether there shall be such a revision. The Government of the Canton having refused to act on a petition to this effect, duly signed by about 10,000 voters, an insurrection broke out at Bellinzona. During an attack on the Government House, in which shots were fired on both sides, Castioni, who was one of the insurgents, fired a shot which killed Councillor Rossi. The Federal Council then intervened. The unpopular members of the Government were dismissed, and on a plebiscite the need of a revision of the Constitution was affirmed. The question of law before the committing magistrate and the higher Court was whether the offence charged against Castioni was of a political character. It was held by the three learned judges before whom the prisoner was brought on *habeas corpus*, that the homicide was committed, not only in the course of, but as *incidental to* and part of a

political insurrection, and that a writ of *habeas corpus* must issue.

* * *

Volenti non Fit Injuria.—The maxim is unquestioned ; but the definition of a *volens* has been a very fruitful subject of judicial meditation and deliverance. Some further light is thrown on the problem by the decision of the Divisional Court in the case of *Brooke v. Ramsden*. The plaintiff was aware of a defect in the machinery at which he was engaged. His employers also knew of the defect, but took no steps to repair it. He, nevertheless, voluntarily continued his work in order not to lose his wages. The plaintiff ascended a beam with the view of remedying the defect in the machinery, and in consequence of his so ascending the beam he sustained the injuries for which he sued for damages. He was non-suited. The Divisional Court ordered a new trial. Mr. Justice Cave laid it down that the mere fact of the workman having made complaint of the defect to an employer was not enough to show that he incurred the risk willingly ; because, if every one who complained or knew of a defect was held to be debarred from recovering damages, bad masters would only have to point out defects in order to put themselves in a better position than masters who took all possible precautions to ensure the safety of their workmen. Mr. Justice Smith remarked : " Now, it has been at last held that the mere knowledge by a workman that a risk would be run by him is not enough to deprive him of the right to recover. There must be a thorough comprehension on his part of the danger and the risk, and a voluntary undertaking by him of the risk and the danger."

* * *

The Procedure Roll.—When a Yankee has a spare moment or two to put in, he, according to tradition, whittles a stick. A Lord Ordinary invariably turns to his Procedure Roll. It is the receptacle into which he casts all the oddments and remnants (to use the drapers' words) of his time. In this way the Procedure Roll, as at present arranged, has its undoubted advantages, and is even economical, inasmuch as it avoids, theoretically at least, any waste of judicial time—for which judicial time, as we are constantly reminded by the

minor contributors, the country pays. Does a short gap occur between peremptory diets, number one of the Procedure Roll is called. Does a Jury Trial or a Proof go off, or untimely collapse—the Court falls back on the patient Procedure Roll for a day's work. And in this way, such is the theory, the great wheels of judicial machinery are never brought to a standstill for want of material. Complaints, however, are from time to time renewed that the treatment of cases on the Procedure Roll is unsatisfactory in practice. These complaints come, not from the minor contributors to judges' salaries, but from agents, from litigants, and even from some counsel. The matters sent for discussion on the Procedure Roll are generally of the greatest importance—it is most often the critical point in the history of a case. Yet the discussion is taken in the casual and haphazard way we have mentioned. As the Roll may be called at any time during a week, a fortnight, or even a month, it is impossible to ensure the attendance of counsel. And one evil leads to another. Uncertainty in one case leads, if we may say so, to still greater uncertainty in another. The fact that no counsel may be found for numbers one, two, etc., adds to the glorious uncertainty of the time when number six may be reached. Not unfrequently a Lord Ordinary's macer has to call the entire Procedure Roll without the counsel for all the parties to the action being able to appear in a single case; and the Court rises and goes home with the pained smile of a thoroughly good man who has been injured, or with some sarcastic expression of its annoyance (according to the individual judicial temperament), and, after all, the minor contributors to the judicial salary do not secure economy. Many agents and litigants contend, moreover, that, from their point of view, efficiency is not secured either. After all, however, the arrangement is the best that is practicable until it is decided to set apart a special diet for the Procedure Roll stage of each case, and to make it as peremptory as are at present diets of Proof. Such a form would undoubtedly bring considerable changes of professional arrangements in its train, and would interfere to some extent with the present concentration of business in the hands of a few counsel. But the advantages to be gained would more than counterbalance such slight and temporary disadvantages.

Special Articles.

RAILWAY LAW OF 1890.

BY JAMES FERGUSON, M.A., ADVOCATE.

A YEAR ago we summarised the results in legislation and decision of the preceding twelve months in so far as they affected the railway system of the country. The twelve months that have since passed have not been signalised by activity on the part of the Legislature. It may, however, not be unprofitable to take up the thread of judicial history again, and shortly review what has been added by our judges to the accumulating mass of case law dealing with railway difficulties and relations.

Questions relating to traffic have received little illustration during 1890 in spite of the existence of the new tribunal appointed to deal with them under the great Railway Statute of 1888. This is probably in no small measure due to the fact that the energies of the companies and of the traders have been engrossed in a *quasi*-litigation of a nondescript character before the Board of Trade, represented by Lord Balfour of Burleigh and Mr. Courtenay Boyle. A wide prospect of parliamentary contest is opened up when the decisions of the Board of Trade are submitted for final legislative sanction, and after that will come struggles before the Railway and Canal Commission and the ultimate appeals to the Superior Courts of law. The Railway and Canal Commission have, however, in one case taken a broad view in the public interest of their powers, and asserted their jurisdiction under the "Facilities" provision of the Railway and Canal Traffic Act of 1854, to compel a railway company to resume the conveyance of passenger traffic on a line on which it did not pay, and had been wholly given up (*Winsford Local Board v. Cheshire Lines Committee*, L. R., 24 Q. B. D. 456, 59 L. J., Q. B. D. 372). A further illustration of the doctrine of *Murray v. G. & S. W. R.* (11 R. 205), *The M. S. & L. R. Co. v. The Denaby Main Colliery Co.* (L. R. 13 Q. B. D. 674, 14 Q. B. D.

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The plaintiff's arm from which a wound, to be caught by the van. When the head of deceased was in the windows, and at a distance from them of from 10 to 15 feet. Under the Regulation of Railways Act, 1873, the railway Company's statutory obligation to carry the mails, at a reasonable

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209, 11 App. Ca. 97), and *L. & Y. R. Co. v. Greenwood* (L. R. 21 Q. B. D. 215), has been afforded by the case of *The Rhymney R. Co. v. The Rhymney Colliery Co.* (L. R. 25 Q. B. D. 146). In the first two of these it had been decided that an action for repetition of overcharges under the Act of 1854 was incompetent; and by the last, that an averment that charges sued for were unreasonable under that Act was no defence to an action for the amount. In the Rhymney case the Railway Commissioners had decided that the plaintiff railway company were giving an undue preference to another coal company as against the defendants by charging them lower rates for the carriage of coal to certain docks than they charged to the defendants. The railway company sued for the amount of charges due to them. The defendants sought to set off, in a counter claim as overcharges, amounts by which charges paid by them under protest prior to the decision of the Commissioners exceeded the rates paid by other companies. It was held they could not do so. No action would lie for the repetition of these overcharges, and therefore the set-off failed.

There have been one or two instances throwing light upon liability for injuries suffered by passengers, or members of the public, or persons engaged in work on a railway although not in the employment of the company. The most remarkable and interesting was that of *Pirie v. The Caledonian R. Co.*, 17th January 1890, 17 R. 1157, 27 S. L. R. 973, in which the facts were these. A young lady met her death when travelling by night, owing to her head, which she had put out of the carriage window on account of an attack of sickness, coming in contact with an apparatus for the automatic delivery of letter-bags into the Post Office van of a train in motion. The apparatus consisted of a frame with an arm from which a pouch containing the letter-bags was suspended, to be caught and swept in by a frame and net attached to the van. When hanging from the frame the pouch which the head of deceased struck was on a level with the carriage windows, and at a distance from them of from 8 to 10 inches. Under the Conveyance of Mails Act, 1838, and the Regulation of Railways Act, 1873, the railway companies are under statutory obligation to carry the mails, and to afford all reasonable

facilities for the receipt and delivery of mails at any place on their railway which the Postmaster-General may require, and obey all reasonable regulations which in his discretion he may make. The apparatus in question was supplied and erected by the Post-Office authorities, and did not belong to, and was not under the charge of, the defenders. It had been in use at the place for twenty years, and a similar apparatus had been in use on all the principal railways for more than thirty years, without any accident being attributed to it. The jury returned a verdict for the defenders, and the First Division were unanimous in refusing a rule, on the grounds that if the erection of the apparatus was a reasonable facility, the defenders were bound to allow it; that if dangerous to the public it would not be a reasonable facility, and that the criterion of fault was whether the company ought to have foreseen that it was a dangerous thing when it was proposed to erect it. It had also been left to the jury to consider whether it was contributory negligence if a traveller chose to put his head 8 or 10 inches out from a window; and some of the judges expressed opinions that the verdict might be upheld on that ground. In *Roe v. G. & S. W. R.*, 17 R. 59, 27 S. L. R. 38, the liability of the company was stretched pretty far. A train reached its destination at 12.40 A.M. on a dark night in the month of August. It drew up to the platform so gently that the pursuer left his carriage in the belief that it had stopped, while it was yet in motion, was knocked down by the door of the carriage, and severely injured. The portion of the platform at which the pursuer's carriage stopped was averred to have been in total darkness; and it was also averred that the arrival platform, which extended for 200 yards beyond the covered station, was insufficiently lighted, there being only five lamps for the whole of this distance, and of these only the two next the covered station were lit at the time. Lords Rutherford Clark and Lee, Lord Young dissenting, held that the case should go to a jury, the questions to be submitted being, "first, whether the pursuer honestly believed that the train had stopped; and secondly, whether that belief was induced by the failure of the defenders to provide lamps." In *Flood v. The Cal. R. Co.*, 27 S. L. R. 127, the same Division of the Court maintained

the cause of the defending company against the pronouncements of successive juries. The pursuer was the widow of a labourer employed by a contractor engaged in filling up some waste ground adjacent to the defenders' line. The defenders by agreement with the proprietor handed over to him their spoil, emptying it out of their waggons on to the side of the embankment. Their servants, assisted sometimes by the contractor's men, then proceeded to clear the signal wires, after which they removed the waggons, the line was reopened, and the contractor's men took away the earth at their convenience. On the morning after a deposit of spoil had been made, the deceased was killed by an express train passing at the speed of thirty to forty miles an hour. He was then engaged in clearing spoil from between the signal wire and the line, with one foot on each side of the signal wire and his back to the line. The first jury gave £50 of damages, indicating that the fault in their view consisted in the railway servants leaving spoil inside the signal wire, which the contractor's men were not, upon the evidence, forbidden to remove. At the second trial the jury gave £150, adding as an additional element of fault that "the railway company should have instructed their engine-drivers to whistle and slow when approaching this particular part of the line where they knew the men were employed." The Court again ordered a new trial, holding that it was contrary to the deceased's duty, and unnecessary for him, to go between the signal wires and the line; that there was no duty on the defenders' servants to remove the soil to a greater extent than they had done; and that no blame attached for insufficient precautions, as the company had no reason to suppose that the contractor's men were in danger. In *M'Fee v. Littlejohn and C. R. & N. B. R. Cos.*, 17 R. 764, 27 S. L. R. 675, an accident took place in peculiar circumstances, in which the companies escaped a liability that upon a superficial view of the facts seemed likely to attach. A cabman was killed when driving along a road in Broughty-Ferry, by being jammed between the roof of his cab and a railway bridge. The height of the bridge was only 6 feet 9 inches. The Railways Clauses Act requires a height of 16 feet over a turnpike, 15 over a public carriage road, and 14 over a private road. But it appeared that there had

originally been no bridge, that the ground on either side of their line had belonged to the company represented by the defenders, and that they had feued it, undertaking to give an access through the embankment of not less than 7 feet in height. In doing this they had continued through their land, and under the embankment, an existing street of Broughty-Ferry, which was the road traversed by the deceased. This street had been, in 1864, appropriated by the Police Commissioners, and in metalling it they had raised the roadway 3 inches. The Police Commissioners were held liable as the persons responsible for the existing condition of a dangerous situation, but the companies were relieved, because what had been done by them was done on their private property for the convenience of their feuars, and not under their statutory powers, but long after the line had been made. Where a railway is carried through a town under statutory powers which provide for negotiation with the Police Commissioners and arbitration as to interference with streets, and the Police Commissioners or the arbiter is satisfied with what has been done, it is incompetent for an individual proprietor whose property has been injuriously affected to sue for decree that the level of a street has been altered, and that it should be restored, and alternatively for damages at common law. His remedy is an individual claim under the Railways Clauses Act (*Muir v. C. R.*, 27 S. L. R. 806).

One case has occurred in Scotland in reference to the carriage of animals. A dog was delivered to a railway guard for conveyance from Kelso to Perth. The owner offered a muzzle for it, but the guard on being assured that it was quiet, and unaccustomed to a muzzle, thought it better to take it unmuzzled. It had a collar and chain on, and at Waverley Station was led by a porter to the parcel office and there tied up, to wait the departure of the Perth train an hour later. This was the usual practice when the interval was short. At the office it showed signs of excitement, and on being led towards the Perth train got unmanageable, tried to bite, and ultimately broke away from the railway official in charge. It found its way to the Botanic Gardens, and there bit one of the gardeners who took part in capturing it. The verdict of a jury for the gardener was set aside, the Court holding that there was

no evidence of fault on the part of the company's servants, and that the company could not be held responsible for such remote consequences of the dog's escape as the pursuer's injury (*Gray v. N. B. R.*, 28 S. L. R. 81).

An interesting contrast is afforded by two cases that have occurred in reference to the important and peculiar class of contracts for the execution of railway works in which the engineer of the company is appointed arbiter. The practice is one against which much may be said, but which is justified by many considerations, and is now too firmly established by the recognition of the Courts as well as by practical convenience to be shaken. It naturally invites and necessitates a close scrutiny of the arbitration clause in each particular case, and of the whole scope and bearing of the contract that may be in question. In *M'Alpine v. The Lanarkshire and Ayrshire R. Co.*, 17 R. 113, 27 S. L. R. 81, the pursuer, after completion and opening of a line which he had constructed for the defenders, sued for the balance alleged to be due to him, of which he averred a portion represented some un-adjusted items, and the rest expense incurred and damage sustained on account of failure of the defenders to supply him timeously with plans, necessitating costly temporary works. The arbitration clause referred to the arbiter "all disputes and differences in any way connected with or arising out of the execution of or failure to execute the works hereby provided for." There was a provision in the specification by which *delay in giving possession of ground* was declared to form ground for an extension of time, of the propriety and duration of which the engineer was to be the sole judge. There was great delay in supplying plans of bridges at important parts of the work. The claim in so far as relating to the un-adjusted items was held excluded by the clause of reference. But with regard to the averments as to the plans, the Lord President said: "I do not think that this matter is referred to the arbiter. In the first place, it seems to me to constitute a breach of an implied obligation in their contract, because the progress of the works and their completion within the time limited by the contract itself, was necessarily dependent on these drawings being supplied in such time as to enable the contractor to go on with his work, and fulfil his obligation

of completing it within the time limited. I think there arises from that a very clearly implied obligation upon the railway company and their engineer to supply these drawings within such reasonable time, and that their failure to do so . . . is a breach of that implied obligation. That is necessarily, I think, from its very nature, a claim of damages." An arbiter in such a contract is not entitled to assess damages unless he is expressly empowered to do so (*Blaikie v. Aberdeen R. Co.*, 15 D. (H. L.) 20); it would be unreasonable to hold that he was, unless the language was very clear, as it might really mean whether there was a good claim of damages in respect of his own negligence. It was held that the claim on this head was not embraced in the reference clause, and the action so far not excluded. In *Adams v. G. N. S. R.* (H. L. 27th November 1890), the Court of Appeal sustained the decision of the First Division, assailing, except to a limited extent practically uncontested, from conclusions for the reduction of an arbiter's award. They differed from the judges of the Court below in the opinions expressed upon one portion of the case. The reference clause committed the construction of the contract, as well as questions regarding the execution of the works, to the arbiter; and there was a clause providing for extension of time in respect of *failure to give due possession of ground, or delay from any other cause not imputable* to the contractors. There was a provision in the specification that the contractor was not to form a small portion of embankment at the extremity of the contract till a neighbouring bridge was completed by another contractor, or he was authorised by the engineer to proceed. This bridge was not finished, or the ground on which the embankment in question was to be made (which had not been asked for) handed over, till within four months of the final completion of the works. The works were eighteen months late in completion, and the arbiter retrospectively extended the time for six months. He decreed for liquidated damages at a rate stipulated in the contract for the period in which he held the contractors in fault, and in so doing omitted to give effect to a limitation by the company of their total claim for liquidated damages, which had been restricted to one half by them in their claim lodged in the reference. The balance was in favour of

the company, even after striking off this excess, which was held to be separable. The Scottish judges had indicated that they considered the award in one respect a hard one, and that if not bound by the Act of Regulations of 1695 and the breadth of the arbitration clause, they would have reduced it; because on a construction of the specification the contractor had been held liable in penalties for not doing what he could not, and was in fact forbidden to do. The Lords of Appeal, on the other hand, pointed out that the Court below had fallen into error in treating the matter as one of construction of the specification; that hardship or not, was a question of fact; that the arbiter was the best judge of it; that his judgment must be presumed to be right unless strong grounds were shown against it; and that it might be perfectly justified by the general condition of the whole works, or the state of other portions at the time possession was given of the piece of ground complained of. The judgment delivered by Lord Watson will probably be referred to as an important authority in Scottish arbitration law, and as completing the decent entombment of the peculiar doctrine of "constructive corruption."

The element of arbitration, of a type peculiar to railway transactions, entered into another case of a complicated nature between two northern railway companies. The Great North of Scotland have for a portion of the distance between Inverness and Aberdeen two circuitous lines which overlap a portion of the Highland Company's system. The two companies entered into an agreement to "pool" all the receipts, to divide them into moieties, and treat the one as if the traffic had travelled by the Great North's shortest line, and the other as if it had come by the Highland route. Each of these moieties was to be divided in accordance with the decision of Mr. Beale, an arbiter appointed in a subsidiary agreement of even date. Under the main agreement, which embraced many other matters, there was a general clause of reference to a Mr. Grierson. Mr. Beale decided that the division was to be according to the respective mileage, and under the rules of the Clearing House. A dispute arose upon this in reference to passengers' fares, and the Highland Company insisted that it should go with other matters before Mr. Grierson, the general arbiter. The Great North under protest submitted their

statement, and Mr. Grierson decided that Mr. Beale's award was to be carried out by giving each company their mileage proportion, not exceeding in the case of passenger traffic the local passenger fares. A further difference arose, and the Highland raised an action for declarator that Mr. Grierson's award meant that the division must simply be in proportion to the local fares charged by each company on the route to which the moiety was attributed. This was inconsistent with the application of the mileage principle, and the Great North contended that mileage must first be given effect to, maintaining that Mr. Beale's award regulated, and arguing subsidiarily that Mr. Grierson's award could be made coherent by treating the reference to local fares as a limitation, and construing local fare as the local fare upon its own route of the company in right of the moiety. The Court held that the action was irrelevant, because the second reference to Mr. Grierson was incompetent, the proper course being to go to Mr. Beale to explain his award, or to go to a court of law to have its meaning determined (*H. R. C. v. G. N. S. R. Co.*, 27 S. L. R. 928).

The defending company in this case was also a defender in an interesting and important case throwing light on the rights and functions of these anomalous bodies, joint-committees representative of two companies interested in one station, but having an independent statutory existence. The Caledonian (in right of the old Scottish North-Eastern) and the Great North are jointly and equally the owners of the Aberdeen joint passenger station, which was erected under the powers and conditions of a special statute. Its "maintenance, management, regulation, and control" are vested in a joint-committee constituted under the statute, and consisting of an equal number of members from the directorate of both these companies, which may sue and be sued in name of their secretary or clerk. By a statute subsequent in date, the Scottish North-Eastern was amalgamated with the Caledonian, and certain privileges over the former North-Eastern system were given to the North British Company. These comprehended the right for certain purposes to "run over and use . . . the Scottish North-Eastern lines, or any part thereof, and the stations, watering-places, works, and conveniences upon or connected with the Scottish North-Eastern lines, . . . includ-

ing, in so far as the company (*i.e.* the Caledonian) lawfully may, the station at Aberdeen, and all conveniences therewith connected." Since 1878 the North British, in the assumed exercise of these running powers, had run on the Scottish North-Eastern lines from near Montrose to Aberdeen, and used the joint passenger station, which is defined to include the railway lines for 200 yards on each side of the station shed. This was under protest from the joint-committee and the Great North of Scotland Company, who were not represented when the Act of Amalgamation was passed. They now raised an action of declarator that the North British were not entitled to run into or use the station without the consent of the Great North, and that the joint-committee were not bound to admit their traffic, concluding for interdict. The defenders pleaded no title to sue. There was no plea of all parties not called. Lord Kinnear dismissed the action, holding that the pursuers were not entitled to insist in it without obtaining the concurrence of the Caledonian, or calling that company for their interest. It was argued that the joint-committee had no independent right; that half its members were Caledonian directors, who were bound to give effect to the obligations of the Caledonian Company; and that its powers were just those of an exaggerated stationmaster. The First Division (Lord M'Laren dissenting) held that the joint-committee was entitled to authorise the action, and all the judges of the majority expressed the opinion that the Great North of Scotland Company would have been entitled to sue alone. The Lord President indicated that perhaps it might be a question whether the joint-committee should have sued alone, but it was quite right that they should sue in conjunction with the Great North Company. Lord Shand and Lord Adam were clear that they would have a title to sue alone. The majority were satisfied that the presence of the Caledonian Company as defenders was not at all necessary, the North British Company being their assignees under the Act of Parliament (*The Aberdeen Joint-Station Committee and G. N. S. R. Co., v. N. B. R. Co.*, 17 R. 975, 27 S. L. R. 1004). Lord Kinnear has since dismissed the action, holding the station in question to be "connected with" the Scottish North-Eastern lines, and disregarding the saving clause of the statute;

and his interlocutor is under appeal. In *N. B. R. v. Mackintosh* (17 R. 1065, 27 S. L. R. 825) it was held that, under certain Acts of Parliament vesting a ferry in parliamentary trustees and afterwards providing for its acquisition by a railway company, the company had a right to exclude any of the public from using the piers for any but proper ferry purposes, except under written authority from them; and interdict was granted against a steamboat proprietor who persisted in using one of the piers without such authority.

The rights to compensation for the injurious results of railway operations received further illustration in an English case, where the injury was caused by the obstruction of light, the windows affected representing to a certain extent ancient lights, and being partly additional or larger windows, constructed when the old building enjoying the ancient lights was pulled down, and modern ones erected on its site. The question was whether the compensation was to be awarded on the footing that it was only due in respect of the ancient lights, or in respect of the whole windows obstructed. The building erected by the defendant railway company had been constructed under statutory authority. The owners of the buildings injuriously affected would at common law have had no cause of action had the interference only been with lights which were not ancient. It was held that, under sect. 16 of the English Railways Clauses Act, the owners were entitled to recover compensation for the whole damage caused. After referring to the *Duke of Buccleuch v. The Metropolitan Board of Works*, Lord Esher, M. R., said: "There is this distinction, that in the present case no land is taken; but on the question of damage how does this matter? The *ratio decidendi* is this: If you can bring the case within the statute, then the words 'full satisfaction for all damages' are to give not only that which would be legal damages in an action, but compensation for all the damage which the property has in fact suffered. If land is injuriously affected, that brings the case within the statute just as much if land is taken" (*In re London, Tilling, and Southend R. Co. v. Trustees of Gowers Walk Schools*, L. R., 24 Q. B. D. 326, 59 L. J., Q. B. D. 162).

The House of Lords have affirmed the decision of the

Court of Appeal (39 Ch. D. 386) in the *Midland Railway v. Robinson*, holding that the "mines of coal, ironstone, slate, and other minerals" excepted out of a conveyance to a railway, and the "mines or minerals" under the railway or within a specified distance which may be worked upon notice, include not only beds and seams of minerals got by underground working, but also such as can only be worked, and according to the custom of the district would be properly worked, by open or surface operations, and that limestone is a mineral (L. R., 15 App. Ca. 19).

It has been laid down that the general provisions of sect. 15 of the English Railways Clauses Act as to the distance to which a company may deviate from the line delineated on the parliamentary plans, and the decisions under that section, to the effect that the distance is to be measured from the *medium filum viæ* of the line as actually laid down to that of the line delineated on the plans, apply only to the construction of a new and not to the widening of an existing line. A railway company were authorised to widen their line, and on the deposited plans the existing line was shown with dotted lines on either side indicating the limits of deviation. They constructed a portion of the widening outside one of the dotted lines, and on land taken from the plaintiff, who brought an action for an injunction, but failed to show any special damage. The land taken was comprised in the parliamentary plans and books of reference, and an original notice for a part was, after a claim from the tenants that the whole should be taken, and a refusal from the landlord to sell anything he was not compelled to sell, supplemented by a second notice to take the remainder. It was held, (by Kay, J.) that the company had exceeded their powers in constructing part of the line outside the limits of deviation, but (assuming this by Kay, J., and the Court of Appeal) that as the subjects were included in the plans, and were reasonably necessary for the completion of the works, the company had powers to take them. The Attorney-General's powers of interference in the interest of the public were not invoked, and the transgression of the statutory powers did not cause special damage to the plaintiff (*Finck v. L. and S. W. R. Co.*, L. R., 44 Ch. D. 330).

The powers of railway companies under the Act of 1867

(30 and 31 Vict. c. 127) as to schemes of arrangement with their creditors were considered in *re The Brighton and Dyke R. Co.*, 44 Ch. D. 28), in *re The East and West India Dock Company*, a dock company which subsequently became a railway company (44 Ch. D. 38), and in *re The West Lancashire R. Co.*, W. N. 1890, 165. The rights of parties, where an extension of an existing railway has been constituted a separate undertaking, were adjudicated on in *re Eastern and Midlands R. Co.*, (45 Ch. D. 367). It was held that when a receiver and manager has been appointed under the Act of 1867, the monies received by him must be applied, first in providing for the "working expenses" of the railway, even though by a special Act a fixed dividend on shares and the interest on debentures, fixing the capital raised for a particular undertaking, are charged on the gross receipts arising from the traffic of the separate undertaking, and traffic passing over both the separate undertaking and other railways of the company. It was held that a loop line having been constituted a "separate undertaking" and the capital raised for it "separate capital," yet the dividend upon and interest of the separate capital were not "working expenses" or "proper outgoings," and must be postponed to working expenses. It was decided that "working expenses" included payments for rolling stock purchased on the terms of payment by instalments at fixed periods, the stock not becoming the property of the company until the complete payment of all the instalments, and the vendor having the right to seize the stock on default in payment of any one instalment.

THE LEGAL CULPABILITY OF THE "CRIMINAL INSANE."*

THE TRUE TEST.

BY JUDGE HENDERSON M. SOMERVILLE, OF ALABAMA.

I HAVE read the paper of A. Wood Renton, Esq., of London, on "The Legal Test of Lunacy," with great interest. This

* We have been favoured with the advance sheets of the *Medico-Legal Journal* of New York, in which this article will contemporaneously appear.—
ED. J. of J.

interest is emphasised by the fact that the subject is one which is now, more and more every day, inviting the attention and research of the most advanced thinkers in the medico-legal world.

The writer speaks of the "silent revolution" which is now going on in reference to the doctrine of the legal culpability of a class commonly designated, for want of a better nomenclature, as the "criminal insane." The readers of the *Medico-Legal Journal*, especially for the past three or four years, cannot fail to be struck with the truth of this observation. The number of papers recently published therein from the most learned alienists in this country and in Europe forcibly attest the fact. Germany, always in the vanguard of scientific as of religious thought, has long since formulated in her criminal code of laws the proposition, that "there is no criminal act when the actor at the time of the offence is in a state of unconsciousness, or morbid disturbance of the mind, through which the *free determination of his will is excluded*" (Code of Germany, sec. 51, R. G. B.) The Code of France, as now interpreted by the Courts of that country, is, in substance, the same. The legal profession in each of these countries has advanced to the progressive view, for the maintenance of which the medical profession had battled vigorously for more than a quarter of a century.

The same contest is now going on in this country and in England. It is the same old fight of Science against the crystallised prejudices of error and ignorance. The united medical world, with comparative unanimity, proclaim as a discovered fact, that the wards of insane hospitals are crowded with inmates who are capable of distinguishing right from wrong, and who yet, through the influence of brain disease, are rendered powerless to *choose* the one and refrain from the other. I instance the following extract from the last *Biennial Report* (1889) of Dr. Peter Bryce, who has been the Superintendent of the Alabama Insane Hospital for the past thirty years, and is recognised as one of the foremost alienists in this country in the treatment of the insane. It voices the views of his profession:—

"The thousand patients," he observes, "now under treatment in our own Hospital, and thousands of others who have

filled its wards during the past twenty-eight years, furnish unmistakable evidence, even to ordinary observation, of the fact that persons of diseased brains, affecting the mind, may be capable of distinguishing the moral and legal quality of a criminal act, and yet not be able to abstain from its commission. They know the right from the wrong, and do not hesitate to avow it, but they cannot choose between the two, and often deplore this inability to control their actions. It would, it seems to me, be a backward step, in both humanity and science, to place these victims of disease in the same category with ordinary convicts in whose behalf no such plea can be interposed. The whole question is one of *disease*, or *no disease*, to an extent which practically destroys the patients' power of self-control. The medical profession," he concludes, "is almost unanimous in its repudiation of the 'right and wrong test' of this disease, and the interests of society, humanity, and science would, in my judgment, be promoted by the adoption of the same view by our Courts of justice."

The case of *Parsons v. The State* (81 Ala. 577), alluded to by Mr. Renton, was decided by the Supreme Court of Alabama in June 1887, having thus been promulgated about two years before Dr. Bryce's report. To this case he alludes, and gives it his earnest endorsement. The doctrine of that deliverance was a repudiation of the "right and wrong test," as adopted in *McNaghten's* case, decided by the English judges, and the endorsement of the modern view that no insane person, who, through disease of the brain, has lost the power to choose between the right and wrong, and to avoid doing the act in question, is legally culpable or accountable.

This decision is merely a step forward in the direction pointed out by modern medical science in its relations to the subject of insanity. It was long ago announced by the learned Dr. Roy, of England, who approved the charge in *Haskell's* case, in these words: "The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, and the *power to adhere to the right and avoid the wrong*?"

We cannot expect the rapid adoption of this new view by the Courts. As Mr. Renton's paper intimates, if it ever obtains in England, as I believe it certainly will in due course

of time, it must be through the means of legislative enactment, as in Germany and France.

In this country the "silent revolution" is advancing with the progressive energy of Truth; which is, and ever must be, the great motive power of Science. In the contest before us we can derive much hope from the past history of the struggles of Science against Ignorance, mailed, as the latter is, in her iron coat of arms. As Mr. Fox once declared on the floor of the British Parliament, "This is a case where one *fact* is worth a thousand arguments." When that psychological fact is believed, the battle will be won. When Charles Darwin, now justly called the Newton of Biology, first announced his theory as to "the origin of species," just thirty years ago, it was received with a storm of indignation and ridicule from pulpit, press, and politician. Ten years later it was accepted by the scientific world to such an extent that Professor Huxley declared before the Royal Institution of Great Britain that he had begun to think that "it would shortly require for its welfare a little healthful opposition." Darwin attributed his success to his habit of "patiently accumulating and reflecting on all sorts of *facts*," which could possibly have any bearing on his theory.

So with the triumph of the Copernican theory of the universe, once a sealed book even among scientists, now understood by every schoolboy. When Copernicus and Kepler and Newton were labouring to conquer the astronomical prejudices of the whole world, religious and scientific, human ideas had not widened sufficiently to comprehend the great thought.

The same is true of geological science. Its advocates had to forge its way to the front through the serried ranks of ignorance, as the Roman eagles were carried through the hostile fields of Scythian and Barbarian. The religious world declined to believe that the globe upon which we live was older than six thousand years until some forty years ago, when the fact was logically proved in Hugh Miller's *Testimony of the Rocks*, that its age might be measured by millions of years.

Law reforms are proverbially slow. Revolutions in this realm of thought always move with abated energy. The Bar

and the Parliament of England long resisted the introduction of the *lex mercatoria*—the established rules and customs of merchants—into the jurisprudence of the common law. So with the various legal reforms for which Lord Brougham so ably contended, many of which are now recognised as happy and useful innovations in our system.

The modern view of insanity, with its scientific rule as to the legal culpability of "the criminal insane," is destined to a sure triumph in the future.* It is based on the solid and imperishable foundation of Truth, whose handmaid is "starred-eyed Science." Error may die amid her worshippers. But not so with Truth; "the eternal years of God are hers."

SPEECH AS A MODE OF BUSINESS.

BY *ÆNEAS J. G. MACKAY, LL.D., SHERIFF OF FIFE*
AND KINROSS.

II.—POLITICAL BUSINESS.

EXCLUDING from view politics as a game which Lord Hartington recently said "most of us practise," and politics as a branch of science which few of us yet study, and still fewer practise, it will now be considered only as a branch of business. It is with speech as now used in practical politics as a mode of doing political business that we are alone concerned. As there are certain qualities of business, and the man of business the same everywhere, and in relation to all kinds of business, it is singular that the legal man of business or lawyer has seldom succeeded in politics, and is generally even distrusted by the political man of business or politician. Various accidental or occasional reasons have been assigned for this. It has been suggested that the lawyer generally enters political life too late, or only as a short cut to the Bench. It has been sometimes observed in his favour that the

* It is a fact pregnant with some encouragement, that a half dozen or more of the American State Courts of highest resort have given their unqualified adhesion to it, and the United States Supreme Court, in the case of *Life Insurance Co. v. Terry* (15 Wallace, 580), have made a decided advance in the same scientific direction.

standard of accuracy required by a lawyer is greater than is common amongst politicians. It has at other times been adversely remarked that the lawyer's method of reasoning, though more logical, is narrower than the politician's, and does not sufficiently allow for considerations that lie outside of, or as it has been urged, are above the law. But the true reason was detected long ago by a great Englishman, who was both a lawyer and a politician,—“Lawyers,” says Bacon, “being habituated and addicted to precedents of their national law, or even the civil or canon law, do not have an open mind, but speak as if in chains. The business of politics properly belongs to those who know best the tendency of human society, the good of the people, natural equity, the customs of various races, and the forms of different States, and so are able to legislate from the principles and precepts as well of Natural Equity as of Political Science.”

Political business differs indeed from legal as the business of individuals differs from the business of a nation. And it cannot be wondered at that its conduct requires different talents. It has a wider horizon. It deals less with the past and more with the future, with general rather than particular matter, with masses or numerous bodies of men, not with a few judges or jurymen. Its aims are to administer, to construct, to reform, not to dispute, acquit, or condemn, or to decide. The extent of this difference is concealed from us by the system of party politics which has obtained in this country for the last two hundred years. The politics of party partake to a considerable extent of the nature of litigation, in which the two sides combat each other by debate before the inquest or jury of the nation, and the lawyer has frequently been a good party speaker or leader. But party politics lie outside of the present inquiry, which relates to politics only as a matter of business. The single remark from the subject of party pertinent to this present subject is, that party speeches, so far as they are fair criticism, or the exact statement of one side of a question, facilitate business, and so far as they are anything else impede it. The business of the nation must, however, be carried on either by or without party, and the question is how it may be carried on by the method of speech. This is done, as we all know, in a country whose government

is popular and representative by larger and smaller assemblies, by Parliament and public meetings, by the Cabinet, the chief committee of Parliament, by special committees or commissions, by administrative offices, and by local assemblies. In all of these, speech is largely used as the mode of doing business. In no country, and at no period, with the possible exception of ancient Athens, has speech been so largely used for political business. Even republican Rome preferred action to speech, and the empire silenced the orators. The French orators have been the leaders oftener of revolution than of settled government. Until recently the Germans and other continental nations have used speech much more sparingly than we have done for political business. Whatever is written on politics, and of course there is much writing in newspapers, books, reports, dispatches, and elsewhere, is in the end with us submitted to the medium of speech. The decision by vote on all important issues is given after reiterated speeches and debate. Speech is *par excellence* the mode of doing political business at this time in this country. There are persons who consider that it is not the best mode, but with that we have nothing to do, for it is the existing mode, and our endeavour must be to treat the subject practically. No practical politician will dispute the importance of the question, how speech can be best regulated so that the necessary business should be done in the best way, with the least waste of time, and the most fruitful and enduring results.

It is necessary to discriminate between the principal divisions of political business, for the use of speech in each of these is different and subject to different rules. It will be sufficient to notice three which are perhaps the principal divisions. One is the ascertainment of the facts necessary for the conduct of political business; the second is the deliberation upon the facts, when ascertained, with a view to a practical decision; and the third is the action to be taken after such decision, whether by legislation in laws, administration in offices, negotiation or war in relation to other nations. Speech is used for each of these purposes. It is used for the ascertainment of facts by questions and answers in Parliament, or other assemblies, or at elections. It is used for deliberation in debates. It is used, though not so largely,

when deliberation has passed by decision into action, legislative, administrative, diplomatic, or military, though in the last it is reduced to the narrowest limits—the word of command.

The use of speech by question and answer, especially in public assemblies, cannot be highly praised as a mode of ascertaining facts or doing business. It is frequently a mode of not doing business. "A fool," says an old proverb, "can ask more questions in a few minutes than a wise man can answer in seven years." The practice of putting questions in Parliament, and of heckling at public meetings, are often flagrant examples of the abuse of speech. Some remedy for this is acknowledged to be necessary, but is difficult to find, for such questions often serve a useful purpose. One suggestion as regards Parliament (well deserving consideration) has been made by Lord Derby, the simple expedient that writing and printing should be substituted for speech. This would not be a great innovation, for most such questions are in fact printed, and many such answers are in fact written. Indeed, sensible members of Parliament who have no desire to advertise themselves at the expense of the national time frequently resort to the practice of putting questions privately. Still this cannot be always done. An urgent question arises at a moment's notice, which it is desirable for Parliament to hear answered to-night and the country to-morrow. An inconvenient question, which might be put off or evaded by a written answer, is occasionally a proper and necessary question. Possibly the matter might be arranged by the decision of the Speaker whether a particular question ought to be put orally. But this must be left to those who have parliamentary experience. This much may fairly be said by those who have not, but who watch with interest the present practice of Parliament. Questions which contain insinuations or innuendoes, however subtly disguised, questions which are meant not to ascertain facts, but to be little speeches, are bad examples of the way in which speech may be used so as to obstruct and not to do business.

Heckling is so peculiar a Scottish institution, and is indeed so useful when used to expose the false pretences or ignorance of a candidate, that it is dangerous to touch it. But it may

be allowable, even in Scotland, to observe that political business is managed elsewhere, in England, and even in Ireland, without the excessive use of it to which we have become habituated. What is specially necessary to insist on as to this mode of doing political business by question and answer is, that it ought always to be *bond fide* and straightforward on both sides. How often the question is foolish or impertinent, sometimes even malicious; and the answer illusory, jocular, or evasive! A contest of word-play easily becomes a contest of horse-play. It is not the way of business, and should be left to the clowns in the pantomime or circus.

By far the most important use of speech in political business is its use in the statement of political measures, in debates upon them, and in addresses, whether inside or outside of Parliament; in short, what are called political speeches. It is sometimes suggested by the newspapers that the newspaper has superseded both Parliament and the pulpit; and certainly the modern newspaper never ceases to write politics except when it prefers for variety to make an excursion in theology. But the newspaper exaggerates its own importance, in which it only half believes. This is shown by the length at which it reports even indifferent speeches. It may be doubted if political speeches are as eloquent as they once were, but they are as powerful as ever. The greater part of political business, which is not done by private or secret party management, is done by public speeches. Comparatively little is done by writing. It would be difficult to name any books published in our time in this country, except those of Mr. John Stuart Mill, which have had much effect on practical politics. Even pamphlets, once a method of considerable influence, and which in recent years have more than once produced important political effects in France and Germany, have become of little consequence, though still often published in England. Both the larger issues and the minor details of political business are mainly decided by speech. It is impossible to shut our eyes either to the powerful use or to the possible and actual abuses of this mode of doing business. How should we who are so governed, whose business is so done, get the most out of this kind of speech, and guard against its abuses? We are in this

matter collectively, though we often overlook it, our own masters. No one knows better than the speaker that he depends on his audience. Their measure is his standard; his defects are their defects. If they are willing to be deceived, they will be deceived; or to be flattered, they will be flattered; or to be biassed, they will be biassed. If they are capable of being educated in political knowledge, or guided to right action or inspired to noble conduct, they will be educated, guided, or inspired, and will resolutely decline to be deceived, flattered, or biassed. But this is, perhaps, to trespass beyond the subject, which is only, How is political business to be transacted by speech? It is so much easier to speak than to do business, or stick to the business in hand. Perhaps I went over the lines, because I am aware I can only offer on this part of the subject a few hints which everybody knows, but, unfortunately, not every one acts on.

The difficulty of transacting business by speech, it will be generally admitted, is increased in proportion to the size of the assembly by which it has to be done; yet it is by large assemblies the most important business has to be done. In these, especially, if as in Parliament every member is entitled to speak, or in public meeting every one present is in theory allowed to speak, the difficulty reaches a maximum, and it is almost a miracle that any business is done. It can be done only by rules both of order and of debate, by giving large powers to the chairman, and by constant self-denial on the part of those present. It may seem a paradox to some, but to others a truism, that business can only be done by speech by the silence of almost all present. You will smile when I advance so simple, almost childish a proposition as that no two persons should speak at once; yet how often by interruptions is this simple, childish proposition violated!

When I add that Time, the invisible, always silent, member, but real dictator of such assemblies, requires that only a limited number should speak at all, and that by conscious or unconscious selection that limited number should be those best qualified to speak on the business on hand, the proposition, though still simple, requires, it may probably also be admitted, much careful arrangement before it can be acted on, and is far from being always observed. Yet it is the first and

essential condition of business being well done by large assemblies. This condition is realised, and much business is done by the combination of good sense and critical instinct in the members of such assemblies, who, without interruptions of the ruder kind, can find means to indicate the fact that they are not listening. A second condition, almost as important, is that business should be carefully prepared by writing before speech becomes the instrument for its settlement, as it is by careful drafts of laws when the business is legislation, by the ascertainment of facts when there is disputable matter to be sifted, and by full and fair notice of the business to be done when the object is to aim at a resolution. It is often, however, a serious question whether a particular piece of political business cannot be better done by delegation from the larger to a smaller assembly, as by a committee of its members or a commission of persons not necessarily members. In the case of laws, it has been seriously debated by persons well entitled to form an opinion whether a large assembly can do good legislative business, and whether such business would not be better done by a legislative council, a committee of experts, or even in some cases by a single expert. Under a system of popular government which hovers near, but perhaps does not yet very rapidly approach the form of a pure democracy, the withdrawal of legislation from the representative assembly must be subject to limits. But even in a pure democracy, good sense is shown when as much as possible of the business of law-making is left to persons educated and trained for this kind of business. It is certainly often very badly done by promiscuous speech in large assemblies. Debates on important questions must be conducted by the representative assembly, however large; but the question whether the number of members in a representative assembly might not be reduced with advantage to the nation, though occasionally mooted, has never been fairly considered, so indisposed are the members of such an assembly to the reduction of their own numbers. Some subordinate points with reference to the conduct and despatch of business by speech relate to the particular members of the representative assembly. Such are, for I can only rapidly name one or two of them, the question whether the length

of speeches might not be limited, or the number of speeches by one person on the same subject restricted even more than at present, or the authority of the president to stop irrelevant speeches still further increased. Freedom of speech is, however, an essential condition of free government. Business is not. And doing business must frequently be sacrificed in favour of freedom. Still it is necessary to say plainly that wherever such freedom becomes licence, wherever speech is used to interrupt or prevent business from being done, and for no other purpose, it is an abuse which ought to be checked. Such a general observation does not go far unless it is accepted and enforced by the common sense of assemblies and public opinion. But it is not beyond hope that such common sense may exist, and such public opinion make itself felt. Here also a free nation is the arbiter of its own destiny. If in the long-run the business it entrusts to its political servants is not done, it has no one to blame but itself. One other mode may be noticed in which political business is not done by speech, and which it is also in the power of a wise public opinion to check. When a speech consists largely in statements which are not facts, or in repetition of what has been often said and often heard or read before by the audience, or when it consists in mere abuse of opponents, calling names, or other varieties of political Billingsgate, such a speech has its uses. It satisfies the itching tongue of the speaker, or the itching ears of a select or vulgar audience. It may gain an election or turn a vote, which no doubt is a sort of political business, but not that here in view. But such speaking is not a way of doing sound and lasting political business. It is worse than waste of time, for it cultivates a habit too easily acquired, of making and hearing speeches for the sake of the speeches, and not for the purpose of doing business. May I venture to say one word as to the art what we call oratory when we admire, and rhetoric when we condemn it? Has it no office even in the doing of sound political business? Is it an exploded or obsolete art at the stage of civilisation we have reached? Many think so, many speeches dispose them to think so. Yet this view is far from the truth. Oratory will always be a power amongst men. Though despised by

minorities, it commands majorities, and ought not to be either neglected or despised. Only as regards the present subject of business, let those who practise this art apply to themselves the saying which the democracy of Athens applied to its greatest speakers. When we hear other orators, we exclaim, they said, "What a fine speech." But when we hear Demosthenes, we say, "Let us march against Philip;" or, as this might be paraphrased at a time when there is no Philip to march against, let us not applaud the speaker, but let us do the business he has taught us lies nearest to our hand.

Appointments.

MR. ANDREW JAMESON, Advocate (1870), hitherto Sheriff of Berwick, Roxburgh, and Selkirk, has been appointed Sheriff of Ross, Cromarty, and Sutherland, in room of Mr. (now Lord) Low.

MR. BOYLE HOPE, Advocate (1858), who was recently appointed Sheriff of Dumfries and Galloway, has been appointed Sheriff of Berwick, Roxburgh, and Selkirk, in succession to Mr. Andrew Jameson.

MR. RICHARD VARY CAMPBELL, Advocate (1864), has been appointed Sheriff of Dumfries and Galloway in place of Mr. Boyle Hope.

MR. GEORGE WATSON, Advocate (1871), has been appointed Sheriff-Substitute of Wigtownshire, in room of the late Sheriff Dickson.

MR. W. DARLING LYELL, Advocate (1882), has been appointed Sheriff-Substitute of Kirkcudbrightshire, in room of the late Sheriff Dickson.

MR. ROBERT SAMUEL WRIGHT has been elevated to the Bench in the room of the late Mr. Baron Huddleston. He was born in 1839, and is the eldest son of the Rev. H. E. Wright, rector of Litton, Somerset. He is a graduate of

Balliol College, Oxford, having taken a First Class in Classical Moderations in 1859, and in Literæ Humaniores in the following year. Between 1859 and 1862 he gained three University prizes—the Latin verse, the English essay, and the Arnold essay. He was elected to a Fellowship at Oriel, of which he is now an honorary Fellow, and he gained the Craven Scholarship in 1861. His *Treasury of Greek Poetry* is a great favourite with classical scholars. He was called to the Bar at the Inner Temple in 1865, and joined the Northern Circuit. In 1877 he was appointed Lecturer in Common Law to the Incorporated Law Society. Mr. Wright is the author of the *Law of Criminal Conspiracies and Agreements*, and joint author with Mr. Henry Hobhouse of an *Outline of Local Government and Local Taxation*. He also wrote, in collaboration with Sir F. Pollock, an essay on "Possession in the Common Law." In 1883 he received the appointment of Junior Counsel to the Treasury. His private practice was of a wide character, largely involving matters connected with local government.

Obituary.

MR. A. CAMPBELL-SWINTON of Kimmerghame died on 27th November last. He was born in 1812, and was educated at Edinburgh and Glasgow Universities, from which he held the degrees of LL.D. and LL.B. respectively. Mr. Campbell-Swinton was admitted to the Faculty of Advocates in 1833. He was a successful and skilful practitioner, and was the compiler of two volumes of reports of cases before High Court of Justiciary. He was Professor of Civil Law in the University of Edinburgh from 1842 to 1863. In politics Mr. Campbell-Swinton was always a staunch Conservative, and in that interest he went through two unsuccessful contests for a seat in Parliament. The first of these was in 1852, when he stood for the Haddington Burghs, and was defeated by Sir H. R. Davie. In 1868 he was defeated by Sir Lyon Playfair for the Universities of Edinburgh and St. Andrews. Mr. Campbell-

Swinton was a sturdy Churchman, and took an active interest and part in the deliberations of the General Assembly.

THE LATE MR. JUSTICE LITTON.—The Hon. Edward Falconer Litton, one of Her Majesty's Judges in Ireland, died on 27th November last. He was born in Dublin on 18th December 1828, and was educated at the University of that city. He was called to the Bar in 1849, and took silk in 1874. Mr. Litton was returned to Parliament in 1880 for the county of Tyrone in the Liberal interest. He was appointed a member of the Land Commission which was constituted by the Land Law Act of 1881. On the retirement of the late Mr. Justice O'Hagan in January of last year, Mr. Litton was appointed Judicial Commissioner and Judge of the Supreme Court of Judicature. His death means a grave loss to the Court of the Land Commission. As a judge, Mr. Justice Litton was noted for his courtesy and patience, and for the skill and aptitude which he brought to the vexed problem of land questions in Ireland.

RIGHT HON. SIR BARNES PEACOCK.—This venerable member of the Judicial Committee of the Privy Council died on 3rd December at the age of eighty-five. Sir Barnes Peacock was born in 1805. He entered early as a law student of the Inner Temple, but for some years he practised as "a special pleader before the Bar," and consequently delayed his call to the Bar until 1836, when he joined the Home Circuit. He took a leading part in the defence of Daniel O'Connell at his trial in 1843; took silk in 1849, and in 1852 was appointed legal member of the Supreme Council of India at Calcutta. In 1859 he was appointed Chief-Justice of Calcutta, and received the honour of knighthood. In 1862 Sir Barnes became Chief Judge of the High Court of Judicature in Bengal. He returned to Britain in 1870, and since 1872 he has acted as a paid member of the Judicial Committee of the Privy Council.

MR. BARON HUDDLESTON.—Sir John Walter Huddleston, one of the judges of the Queen's Bench Division of the High Court of Justice in England, died on 7th December. The deceased judge was seventy-three years of age, having been

born in Dublin in 1817. He was educated at Trinity College, Dublin, and was called to the English Bar by Gray's Inn in 1839, when he joined the Oxford Circuit. He took silk in 1857, was elected a Bencher of his Inn the same year, and from 1865 till 1875 he was Judge Advocate-General. He was a Conservative in politics, and represented Canterbury from 1865 till 1868, and Norwich from 1874 till 1875. In the latter year he was elevated to the Bench as a judge of the Common Pleas, but was soon transferred to the Court of Exchequer. In 1879 Baron Huddleston was made one of the judges of the Queen's Bench Division.

The Month.

Sheriff-Substitutes in Galloway.—The jurisdiction of the late Sheriff Dickson in Dumfries and Galloway has now been divided into two. Under the new arrangement there will be a Sheriff-Substitute for the Stewartry of Kirkcudbright, who will be located at Kirkcudbright, and who will hold Courts there, and also at Maxwelltown and Castle-Douglas. Another Sheriff-Substitute has been set apart for Wigtownshire. It is understood he will reside at Newton-Stewart, and will hold Courts there, and also at Wigtown and Stranraer. The former arrangement, involving as it did so much railway travelling, was found to be too great a strain on the Sheriff-Substitute.



Orders by the Boundary Commissioners.—We understand that Mr. Hay Shennan, Advocate, Secretary to the Boundary Commissioners, and joint author of a work on the Local Government (Scotland) Act, 1889, has in preparation a book on this subject. The work will appear in spring. It will contain all Orders of the Commissioners affecting county and parochial boundaries, together with full and detailed explanations as to the effect of such Orders. To those actually engaged in local administration the volume will be of the

greatest service. Outside the ranks of such, however, there are many who from time to time will find it necessary to ascertain the precise effect of the various changes which are now being made on local boundaries, *e.g.* for the registration of writs relating to land, and for these some such guide will be found to be indispensable.



Recruits for the Bar.—By the admission of seven new members to the Faculty of Advocates on the 18th December, the number of counsel in daily attendance at the Parliament House has been raised to 203. This is greatly beyond all precedent. It is only too true that the volume of business before the Supreme Courts has not increased in proportion, or, indeed, much absolutely; and, while work is on the whole rather more widely distributed than it was formerly, we must admit that amongst the 203, professional success must still be the prize of a few.



English Registration Cases.—The registration cases are of unusual importance this year. In *Dix v. Kent*, after consideration of *Baker v. Town-Clerk of Monmouth*, it was held that an "alms person" living at St. Bartholomew's Hospital rent free, and receiving a weekly allowance of ten shillings and half a ton of coals at Christmas from the trustees, was disfranchised by the receipt of alms within the meaning of sect. 36 of the Reform Act of 1832 (applied to county voters by sect. 40 of the Representation of the People Act, 1867), whereby no person may be registered as a borough voter who shall within the qualifying period "have received parochial relief or other alms which by the law of Parliament disqualify from voting in the election of members to serve in Parliament." In *Sutton v. Wade* it was held that a notice of objection, signed, not at the foot, but above the names of the persons objected to, was good. Both these decisions appear to be unquestionably correct. Three other cases calling for notice are *Plant v. Potts*, in which it was held, upon the construction of sub-sects. 12 and 13 of sect. 28 of the Parliamentary and Municipal Registration Act, 1878, that the

revising barrister had no power to amend a "nature of qualification" from freehold to leasehold; *Mackay v. M'Guire*, in which a tenant kept his vote although it had been assailed on the ground of bankruptcy, it being contended that his tenancy had passed to his trustee in bankruptcy by assignment in law; and *Re Kaye and Others*, in which it was held that certain canons of Lincoln could not obtain a qualification in respect of chapter property which they occupied. With the exception of *Plant v. Potts*, these decisions also seem to be unassailable. *Plant v. Potts*, in which Mr. Justice Grantham dissented from the other two members of the Court, is to be taken to the Court of Appeal.—*Law Times*.



FROM the recently published Parliamentary Blue-Book, containing judicial statistics relating to England and Wales for last year, some idea can be formed of the extent to which the appellate jurisdiction of the Courts is invoked. It is noticeable, however, that there has, of late years, been a considerable falling off in the number of appeals presented, especially to the Court of Appeal, consisting of its two divisions, Chancery and Queen's Bench. For it seems that the appeals from final judgments awaiting a hearing at the commencement of, and set down during, the year 1888-9, were 271 less than they were five years ago, the figures being 520 as against 791. In the appeals from orders made on interlocutory motions, a conspicuous decrease is likewise observable. Thus, in 1888-9, there were altogether 246 of such appeals awaiting a hearing at the commencement of, and set down during, the year, compared with 409 in 1884-5, or a decrease of 163. No original motions were awaiting a hearing at the commencement of the year; but 137 were set down in 1888-9, as against 128 in 1884-5, showing an increase of 9. The proceedings in connection with appeals from the County Palatine of Lancaster and from the London Bankruptcy Court are also stated. Information is afforded as to how the various appeals were disposed of during the year, whether heard or otherwise; but nothing is said touching the result that attended the appeals. The appellate business to be disposed of being less heavy than formerly, which pre-

sumably is a matter of congratulation, the Chancery Division of the Court of Appeal sat 186 days only in 1888-9, as against 203 in 1887-8, and 207 in 1884-5; while the Queen's Bench Division thereof sat 199 days in 1888-9, as against 205 in 1887-8, and 207 in 1884-5. Consequently, the totals of the days of sitting in the three years respectively were 385, 408, and 414. Continuing our examination of the elaborate statistics we have been referring to, we come next to the proceedings of the Judicial Committee of the Privy Council. Although the number of appeals entered in 1889 was only 75, compared with 99 in 1888, and 82 in 1885, yet the number heard and determined in 1889 was 67, compared with 64 in 1888, and 40 in 1885. Of these, judgment was affirmed in 44, reversed in 19, and varied in 4; the corresponding figures in the year before being 40, 19, and 5. The latter particulars are decidedly interesting, and it is to be regretted that no similar information is vouchsafed in regard to the proceedings of the Court of Appeal. From the return of the judicial proceedings of the House of Lords, it appears that the total number of cases presented was 72 in 1889, as against 71 in 1888, and 86 in 1885. Of the appeals and causes in error presented in 1889, 13 were in matters of real property, the number under this head having been 17 in the preceding year; 25 were in matters of personal property, as against 16 in the preceding year; and 34 were classed under miscellaneous, as against 34 in the preceding year. In 1889 the total number of judgments delivered was 48, of which the vast majority, namely, 33, were affirmed. Only 8 were reversed; 2 were reversed in part; 2 were reversed with declaration; and 2 with directions.—*Law Times*.



Crime and School Board Membership.—The decision of the Divisional Court in *Conybeare v. The London School Board* is not only important as determining that a "crime," imprisonment for which under the 14th rule of schedule 2 of the Elementary Education Act, 1870, vacates the seat of a member of the School Board, need not be a crime committed or an imprisonment suffered in England, but also as declaring that

offences punishable under the Crimes Act (Ireland), 1887, are equally punishable here, the only difference being that the perpetrators of such offences in England can only be rendered amenable by indictment, whereas in Ireland they can be proceeded against either by indictment or by summary process. On behalf of the plaintiff it was admitted that the offence of which he was convicted, namely, conspiracy to interfere with the administration of justice, was an indictable offence in England; but it was contended that, inasmuch as it was not proceeded against by way of indictment, but summarily, it did not come within the category of an indictable offence. Mr. Justice Day, however, in delivering judgment, remarked that the plaintiff had undoubtedly been punished in Ireland for an alleged crime of conspiracy; that was an offence against the Crown for which an indictment would lie. Conspiracy in Ireland as in England was an offence against the Crown, according to the common law, and it was an indictable offence. A conspiracy to interfere with the administration of justice was undoubtedly a common law crime, and he took the word "crime" to mean an offence against the Crown for which an indictment would lie. Here the Crown did not indict Mr. Conybeare, but adopted a summary proceeding before magistrates, and by them he was convicted. It, however, did not cease to be a crime because the Crown did not proceed by indictment; it still remained the same kind of offence, a crime as he had defined it.—*Law Times*.



Form of Oath.—On 5th December, at Chelmsford, Mr. Justice Hawkins heard the case of *Reg. v. Dines*, in which Mr. J. H. Murphy appeared to prosecute the prisoner, a private in the Norfolk Regiment, for an assault upon a girl of the age of twelve. Mr. Murphy proposed to call the child's sister, aged nine, to give confirmatory evidence. After the oath had been tendered, but before the girl kissed the Testament, Mr. Justice Hawkins asked the witness if she had understood what she had been listening to. The girl said "Yes," but could give no further explanation, whereupon his lordship remarked that the form of oath used in Courts of Justice was most unfortunate. In his opinion it was con-

stantly the case that boys and girls took an oath not at all understanding what was said to them; and, if careful inquiry was made, it would turn out that many adults, when uneducated, were equally incompetent to follow the complicated form of oath administered to them. It would be far better if some such simple form as this, "I swear to God to speak the truth," were used, and then any person who had any belief in God could understand what he was saying. The foreman intimated that, having heard the other evidence, the jury thought the evidence of the second little girl might be dispensed with, and this was done.

* * *

A Singular Nota Bene.—Law-reporting has become more matter-of-fact as the sessions have succeeded each other, and you cannot now look to find the touches of human interest which some of the older reporters unfold. We should, for example, look in vain throughout the whole seventeen volumes of *Rettie* for a note at all resembling that which we shall now quote from the Decisions collected by Sir David Dalrymple of Hailes, Bart. (Lord Hailes). To the case of *Mrs. Barbara Lowther v. Murdoch M'Laine* (December 15, 1786, 2 Hailes, 1786), an action of aliment, is prefixed by this curt rubric:—"Aliment to a wife, not entitled to legal or conventional provisions, found due by the husband's heirs." But its conclusion is the following note by Lord Hailes (who was one of the judges in the case):—"N.B.—Some of the judges who carried this question told me that they did not mean that Mrs. M'Laine should have any aliment, in case she married again; if so, they have shown little favour to a handsome young woman of irreproachable character."

* * *

DURING the trial of a case in the Camden County Circuit Court, the plaintiff's son (a raw country bumpkin) was testifying; and as he persisted in addressing all his answers to his own counsel, who sat back of him and at the farthest possible point from the jury, both the Court and jury had great difficulty in understanding anything that he said.

Finally, after repeated requests from the Court that he speak louder, the judge stopped the witness and said,—

"You must speak so those gentlemen over there [pointing to the jury] can hear you."

"Why, judge," replied the witness, "are those fellows interested in my case?"

This innocent remark, as can well be imagined, provoked great laughter, in which both Court and jury joined.—*Green Bag.*

* * *

JUDGE (*to Plaintiff*). "Who was present when the defendant knocked you down?"

PLAINTIFF. "I was, your honour."

* * *

"I MUST and will have order in this Court," sternly remarked a presiding magistrate; "I have disposed of three cases without hearing a word of the evidence."

* * *

A WESTERN judge, delivering a severe lecture to a convicted prisoner in the presence of the jury, remarked: "You are one of the most unmitigated scoundrels I have ever known. A jury of your peers has just properly convicted you, and you must suffer the usual penalty of those who keep bad associates."

* * *

A WITNESS was testifying that he met the defendant at breakfast, and the latter called the waiter and said,—

"Stop!" exclaimed the counsel for the defence, "I object to what he said."

Then followed a legal argument of an hour and a half on the objection, which was overruled, and the Court decided that the witness might state what was said.

"Well, go on and state what was said to the waiter," remarked the winning counsel, flushed with his legal victory.

"Well," replied the witness, "he said, 'Bring me a beef-steak and fried potatoes.'"—*Green Bag.*

A NEGRO being asked what he was in jail for, said it was for borrowing money. "But," said the questioner, "they don't put people in jail for borrowing money?" "Yes," said the darkey; "but I had to knock de man down free or fo' times before he would lend it to me."



A JUDGE, delivering a charge to a jury, said: "Gentlemen, you have heard the evidence. The indictment charges the prisoner with stealing a pig. This offence seems to be becoming a common one. The time has come when it must be put a stop to; otherwise, gentlemen, none of you will be safe."

Reviews.

Principles of Mercantile Law, in the subjects of Bankruptcy, Cautionary Obligations, Securities over Moveables, Principal and Agent, Partnership, and the Companies Acts. By RICHARD VARY CAMPBELL, M.A., LL.B., Advocate. Second Edition, revised and enlarged. Edinburgh: Green & Sons. 1890.

MR. VARY CAMPBELL has done well to prepare a second edition of his well-known work. Legislation has not been idle since the book first appeared in 1881, but has made several important changes and additions in the various departments of mercantile law. All these, as well as those introduced by judicial decision, are clearly and fully set out in the present edition. The Partnership Act of last year, and the other statutes bearing on the various subjects, are printed in the Appendix. Again we heartily recommend this treatise. The author has been assisted in his work of revision and enlargement by Mr. Lawrence T. Napier, Advocate.

A Concise Treatise on Private International Jurisprudence, based on the Decisions in the English Courts. By JOHN ALDERSON FOOTE, of Lincoln's Inn, Barrister-at-Law, etc. Second Edition. London: Stevens & Haynes. 1890.

IN this second edition, the author tells us, nearly three hundred additional cases have been considered and cited, and in consequence much of the text has been rewritten. This is so particularly in the case of the pages which treat of nationality, legitimacy, jurisdiction over, and alienation of, moveables, and capacity to contract. The relevant cases under the English Judicature Acts, so far as practicable, have been incorporated. Owing no less to its form and scheme, than to the completeness and range of its contents, Mr. Foote's work is well suited for the purposes of practising lawyers.

English Constitutional History, from the Teutonic Conquest to the Present Time. By THOMAS PITT TASWELL-LANGMEAD, B.C.L. Oxon., late Professor of Constitutional Law and History, University College, London. Fourth Edition. Revised throughout, with Notes and Appendices. By C. H. E. CARMICHAEL, M.A. Oxon. London: Stevens & Haynes. 1890.

SINCE its first appearance, Mr. Taswell-Langmead's work has been the medium of introduction to the study of English Constitutional History for the vast majority of students; and as a standard work for those more versed in the subject, it has held one of the highest places. In noting the appearance of a fourth edition of its interesting and accurate pages, we need only remark that the work has been carefully revised by Mr. Carmichael, and very considerably added to. The Appendices have been increased by the insertion of much valuable matter.

English Decisions.

NOVEMBER.

All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

PRINCIPAL AND AGENT.—*Agent bribed by third party—Remedy of principal—Agreement between principal and agent—Joint tortfeasors—Action by principal against briber.*—The plaintiffs were proprietors of gasworks, and employed H. to examine tenders for coals and advise upon them. The defendant, a coal merchant, offered H. a commission on the coals that H. could induce the plaintiffs to buy of him, and, in order to recoup himself the amount of this commission, inserted in his tender prices in excess of the current market prices. On discovering this fraud, the plaintiffs entered into an agreement, not under seal, with H., in pursuance of which H. deposited with them securities of an agreed value, and the plaintiffs brought this action at his cost and at his request, and agreed to apply for H.'s benefit, by reducing the amount of his securities which they held, any money they might be able to recover under it. The action was to recover the difference between the market price of coal supplied by the defendant to the plaintiffs and the sum actually paid. *Held* (by the Master of the Rolls and Lords Justices Lindley and Lopes), that the rights of the plaintiffs against the defendant arising out of the above transactions were entirely distinct from their rights against H., and that consequently the agreement entered into between the plaintiffs and H., whether or not it was *ultra vires* or binding on the plaintiffs as not being under seal, was no defence in this action.—*Mayor and Corporation of Salford v. Lever*, Ct. of App., 1 November.

CONTRACT IN RESTRAINT OF TRADE.—The members of a Mineral Water Manufacturers' Association, with the object of keeping up the price of the waters at not less than 9d. per dozen bottles, bound themselves for ten years to sell only at that price, or at such other price as the committee might from time to time direct. For every infraction of this rule a penalty was to be recoverable in the County Court. In an action for recovery of the penalty, where the contravention was admitted,—*Held* (by Mr. Justice Day and Mr. Justice Lawrence), that the combination was in restraint of trade, and could not be enforced in law.—*Urntan v. Whitelegg Brothers*, High Ct., Q. B. Div., 5 November.

NEGLIGENCE.—*Reparation—Loose shunting.*—A platelayer, engaged in his ordinary duty of cleaning points, was knocked down and killed by a truck which was being shunted. The truck had been let loose 250 yards away, and was travelling noiselessly down an incline at the rate of about four miles an hour. There was no

brakesman on the truck, and the deceased had no warning of its approach. In an action by his representatives, under Lord Campbell's Act,—*Held* (by Mr. Justice Day and Mr. Justice Lawrence), that there was no evidence of negligence on the part of the railway company.—*Hamblin v. Great Western Railway Company*, High Ct., Q. B. Div., 5 November.

TRADE NAME.—*Title by use and reputation—Imitation—Book—Serial—Dissimilarity in appearance.*—A motion was made by the plaintiff to restrain the defendant from publishing or selling any weekly journal or other periodical under the title of "Enquire Within," or any title similar to or only colourably differing from the title "Enquire Within upon Everything," being the title of the plaintiff's copyright work, at present being issued in weekly numbers. In 1855 the plaintiff issued his work, "Enquire Within upon Everything," in monthly numbers. In consequence of the great demand he, in 1864, again issued it in monthly numbers. Since 1864 he had issued the complete work in the form of a book. In September last he found that the defendant was proceeding to issue, in a newspaper form, a work called "Enquire Within," in weekly penny numbers, whereupon he, the plaintiff, commenced to reissue his own work in weekly penny numbers in book form, and then served the defendant with notice of motion as above stated. The plaintiff relied upon the name "Enquire Within," by which his work was universally known, as a trade name to which he had acquired an exclusive title by use and reputation, and contended that an injunction ought to be granted to restrain the defendant from issuing a work under that name, for, although there might be some difference in general appearance between the two publications, there was a strong possibility of the defendant's publication being mistaken for a serial reissue of the plaintiff's book. According to the plaintiff's evidence his publication was constantly asked for as "Enquire Within," not "Enquire Within upon Everything," and that if an intending purchaser asked for a copy of "Enquire Within," the bookseller could not know which to supply, the plaintiff's book or the defendant's publication. The plaintiff's publication was really a book, and what he now issued was practically a re-edition of his book in serial weekly numbers. The numbers were in exactly the same form as the book, were of the same size as the book, and in all respects like it without any alteration whatever. The defendant's publication, on the contrary, in form, size, and arrangement was totally unlike the plaintiff's book, and was illustrated, and contained all sorts of matters that found no place in the plaintiff's book. *Held* (by Mr. Justice Kay), that the defendant's publication differed so widely from the plaintiff's book that no one could possibly be deceived nor imagine it to be a reissue of the plaintiff's book; that at present there was no evidence of intention to deceive, or that defendant's conduct was calculated to deceive.—*Houlston v. Morley*, High Ct., Ch. Div., 7 November.

REGISTRATION.—*Parliamentary voters—Disqualification—Receipt of alms.*—The name of the appellant had been duly entered on the list of freemen entitled to vote at parliamentary elections. Notice of objection was served by the respondent on the appellant, the material part being that he had received disqualifying alms during the twelve months ending the 15th July last. The appellant had, thirteen years ago, been elected, and has since continued, and still is, an alms person of the hospital, and has during the whole of that time occupied gratuitously and resided in a room in the hospital assigned to him by the trustees, and has received from them a weekly allowance of ten shillings and half a ton of coals every Christmas. He has also occupied a separate plot of garden ground assigned to him by the trustees. By the scheme approved of by the Charity Commissioners the alms persons are to be elected from poor deserving men and women of good character, who have not during the period of three years next preceding their appointment been in receipt of parochial relief. A reasonable amount of washing was provided for alms persons, and no alms person was allowed to be absent from the almshouse for a period exceeding twenty-four hours without consent in writing of the trustees, and alms persons could be removed for certain specified causes. No evidence was given that the appellant had any other means of subsistence, and it was taken that he had no other means of subsistence. The revising barrister held that the appellant had been receiving alms such as to disqualify him from being registered as a voter. *Held* (by Mr. Justice Grantham, Mr. Justice Williams, and Mr. Justice Lawrence), that the appellant, by receiving the benefits of the charity, was disqualified, and that his name ought not to be on the voters' list.—*Dix v. Kent and Another*, High Ct., Q. B. Div., 7 November.

PARLIAMENT.—*Registration of voters—Borough vote—Inhabitant occupier of dwelling-house as tenant—Bankruptcy, adjudication of, during qualifying period—Occupation of house undisturbed—Acceptance of rent by landlord after adjudication—Bankruptcy Act, 1883 (46 and 47 Vict. c. 52), secs. 20, 168—Representation of the People Act, 1867 (30 and 31 Vict. c. 102), sec. 3, sub-sec. 2.*—By sec. 3 of the Representation of the People Act, 1867 (30 and 31 Vict. c. 102), it is provided that "every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows (that is to say) . . . (2) Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough." At a court held for the revision of the list of persons entitled to be registered as parliamentary and municipal voters for the city of York, W. B., the nature of whose qualification was stated to be a dwelling-house, was duly objected to on the ground that he had not occupied as tenant the house in question throughout the qualifying period. He

was a yearly tenant, and during the qualifying period, viz., on the 17th October 1889, was adjudicated bankrupt. His occupation of the house, however, was never disturbed by the landlord or any one else, but was continuous during the whole of the qualifying period, the landlord accepting the rent from the bankrupt on the usual quarter days. No act of any kind in relation to the bankrupt and his dwelling-house was ever done or signified by any one officially connected with the bankruptcy. The revising barrister being of opinion that this occupation was always clothed with the legal character of tenancy—first, by contract; then by implication of the common law, with a tenancy at will; and subsequently by acceptance of the rent, with the character and incidents of a yearly tenancy,—*Held* that the objection failed, and retained the name of the voter on the lists. The objector appealed, and it was contended on his behalf that, by sec. 20 of the Bankruptcy Act, 1883, upon the voter being adjudged bankrupt, the tenancy of the house, as well as the bankrupt's other property, vested in the trustee, who could have assigned it to a third person. Therefore, for some time at any rate after the adjudication, the occupation of the house was permissive, and not as a tenant within the meaning of sub-sec. 2 of sec. 3 of the Representation of the People Act, 1867, and that his name should be expunged from the lists upon that ground. *Held* (by Mr. Justice Grantham, Mr. Justice Williams, and Mr. Justice Lawrance), that, as the trustee had put forward no claim to the tenancy of the house, the holding over of the bankrupt, coupled with the subsequent receipt of rent by the landlord, constituted a tenancy by the bankrupt as tenant to the landlord from the date of the adjudication, and that the revising barrister was right in retaining the voter's name upon the lists.—*Mackay v. M'Guire*, High Ct., Q. B. Div., 10 November.

EXTRADITION. — *Political offence* — *Habeas corpus*. — During a political rising in Ticino, a Swiss canton, Councillor Rossi was shot by one Castioni in the course of an attack on the Government House. Castioni fled to England, and the Swiss Government applied for his extradition. The magistrate committed to prison. This was a rule *nisi* for a writ of *habeas corpus*. The question of law was whether the crime with which prisoner was charged was of a political character. *Held* (by Mr. Justice Denman, Mr. Justice Hawkins, and Mr. Justice Stephen), that the homicide was committed not only in the course of, but as incidental to and part of, a political insurrection, and that a writ of *habeas corpus* must issue. — *Re Castioni*, High Ct., Q. B. Div., 11 November

TRADE MARK. — *Application to register* — *Device and words* — *Old mark* — *User as a whole* — *Patents, Designs, and Trade Marks Act, 1883* (46 and 47 Vict. c. 57), secs. 69 and 74. — The applicant, L. M., had for upwards of twenty years carried on business at Antwerp as a distiller of a spirit known by the generic name of "Geneva." During this period L. M. had exported considerable quantities of Geneva to ports in Great Britain, contained in cases marked with

the device of a key and the name of the applicant. The goods thus forwarded were in fulfilment of orders from British spirit merchants carrying on business in this country, who invariably purchased the Geneva for the purpose of exporting it to the colonies or other foreign countries. When the goods arrived at British ports they were taken out of the ship in which they came and put on to lighters, and thence loaded into the ship which was to carry them to their destination abroad. The buyers in this country occasionally, but not always, opened a case containing several bottles of Geneva, and took out a bottle as a sample; but there was no evidence that any of these bottles had been sold or disposed of to any one in this country, or exposed for such sale. The letter paper used by L. M. in his correspondence with his customers in Great Britain had impressed upon it the device of a key similar to that marked on the cases, and one or more large cards bearing somewhat similar devices had been sent by L. M. to his customers in this country by way of advertisement, with the intention of their being displayed in the offices of the spirit merchants; but there was no evidence that such cards had ever been so displayed. On an application to the Court to direct the Comptroller of Trade Marks to proceed with the registration of the device of the key together with certain words including the name of L. M. as an old mark—i.e. used before the 13th August 1875—the question arose whether, upon the foregoing facts, there had been such a user in this country as to constitute the device an old mark within the meaning of sect. 74 of the Trade Marks Act, 1883 (46 and 47 Vict. c. 57). *Held* (by Mr. Justice Chitty), that such user had not been made out, and that therefore the applicant was not entitled to registration. Also, that the device sought to be registered differed substantially from that which was alleged to have been used, inasmuch as it contained certain additional words; and that upon this ground also the application failed. Upon such an application the Court has no power to give leave to disclaim part of the device proposed to be registered.—*Re Meeus's Trade Mark*, High Ct., Ch. Div., 12 November.

WILL.—*Gift to such children as attain twenty-one—Intermediate income—Maintenance—Conveyancing Act, 1881, sec. 43.*—W. J. by will gave all the residue of his estate to trustees upon trust to sell, convert, and to stand possessed of the proceeds upon trust for all and every the present and future-born children of his son and two daughters, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under it, *per capita* and not *per stirpes*. He then directed that the shares of children born in his lifetime should be held on trust for them for their lives with remainder to their children. The testator died in 1887. There were eleven children of his two daughters living at his death, of whom six had attained twenty-one. At the time of the hearing of this summons his son had no children, but had only lately married. One of the daughters and her children took out this summons for

the determination of the question, who were entitled to the income of the trust fund, and whether maintenance could be allowed to the infant children out of such income under the Conveyancing Act, 1881. *Held* (by Mr. Justice North), that the children who had attained twenty-one for the time being were entitled to the whole income of the fund, and therefore no part of it could be applied in the maintenance of the infants.—*Re Jeffery; Burt v. Arnold*, High Ct., Ch. Div., 13 November.

COMPANY.—*Winding-up—Arrangement with creditors—Sanction of Court—Power to sanction scheme depriving debenture-holders of their security—Joint-Stock Companies Arrangement Act, 1870, sec. 2.*—This was a petition under sec. 2 of the Joint-Stock Companies Arrangement Act, 1870, by the liquidator of a company which was being wound up under the supervision of the Court, to obtain the sanction of the Court to a scheme of arrangement between the company and its creditors. The proposed arrangement had been approved by more than the prescribed majority at meetings respectively of the debenture-holders, unsecured creditors, and shareholders of the company. The petition was opposed by two dissentient debenture-holders, on the ground (*inter alia*) that the scheme compelled the debenture-holders to surrender their security in exchange for new debentures at a lower rate of interest, and payable at a later date than their original debentures, and otherwise diminish their security. *Held* (by Mr. Justice North, in accordance with *Re Empire Mining Company*, 44 Ch. Div. 402, and other cases referred to in the arguments in that case), that the Act gave the Court jurisdiction over the debenture-holders of a company and empowered it to sanction a scheme which would deprive them of their security. The Court sanctioned the scheme.—*Re The Alabama, New Orleans, Texas, and Pacific Junction Railway Company*, High Court, Ch. Div., 13 Nov.

RAILWAY COMPANY—*Undue preference—Application by trading association—Traders of other places granted lower rates—Necessary for securing traffic—Public interests—Railway and Canal Traffic Act, 1888 (51 and 52 Vict. c. 25), secs. 7, 27.*—It is provided by the Railway and Canal Traffic Act, 1888 (51 and 52 Vict. c. 25), sec. 27, that (1) whenever it is shown that any railway company charge one class of traders in any district lower rates for the same or similar merchandise than they charge to other traders in another district, the burden of proving that such lower charge does not amount to an undue preference shall lie on the railway company; (2) in deciding whether a lower charge does or does not amount to an undue preference, the Commissioners may take into consideration whether such lower charge is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made. An association of traders at Liverpool having obtained from the Board of Trade a certificate, under sect. 7 of the Act, that they were a proper body to make such a complaint, complained that the rates charged by the respondents for the carriage of grain and flour from Cardiff to Birmingham were lower than those for the same

merchandise from Liverpool to Birmingham, the rate charged for two-ton lots from Cardiff to Birmingham, a distance of 173 miles, being 8s. 4d. per ton, while the rate charged for similar lots from Liverpool to Birmingham, a distance of 98 miles, was 12s. 9d. per ton; the applicants submitted that these rates were an undue preference to traders at Cardiff, and an undue and unreasonable prejudice to traders at Liverpool. Evidence was given on behalf of the respondents to show that the amount of grain and flour carried by them from Cardiff to Birmingham was so small that it could not affect the trade of the applicants, and that the rates from Cardiff to Birmingham were regulated by those of other railway and canal companies carrying similar merchandise from the Severn ports to Birmingham. It was submitted on behalf of the respondents that these lower rates were necessary for the purpose of securing in the interests of the public the traffic in respect of which they were made. *Held* (by Mr. Justice Wills and Commissioners), that the public interests did not require the maintenance of the low rates between Cardiff and Birmingham, and the respondents must no longer prejudice the applicants by the undue preference complained of.—*The Liverpool Corn Trade Association v. London & North-Western Railway Company*, Railway and Canal Traffic Court, 14 Nov.

LEGACY.—*Uncertainty—Charitable bequest.*—A testator directed that his trustees should stand possessed of the sum of £200,000 upon trust, to apply the same "for the advancement and propagation of education in economic and sanitary science in Great Britain." On a question whether this was a good charitable bequest, or whether the purpose of it was too uncertain,—*Held* (by Lords Justices Lindley, Brown, and Fry, affirming the decision of Mr. Justice Stirling), that it was clearly a good charitable gift; and though the purpose was a little vague, it was not so vague as to prevent the Court from directing a scheme to be settled.—*Re Berridge: Berridge v. Turner*, Ct. of App., 14 November.

SHIPPING.—*Advanced freight—Loss of vessel—Right to advanced freight after loss of vessel.*—The action was brought to recover a sum of about £209 for "advance freight" alleged to be due from the defendants to the plaintiffs under the following circumstances: The defendants had chartered the plaintiffs' vessel, the *Gemma*, to carry a cargo of coals from Hull to Odessa. The charter-party, which was dated the 30th Nov. 1888, was in the usual form, and contained the provisions that the freight was to be paid on unloading and right delivery of the cargo, in cash at current exchange; that the captain or owners should sign charterers' bills of lading; and at the end of the charter-party there was the following clause, which was the material clause in the present case, namely: "One-third of the freight, if required, to be advanced, less 3 per cent. for interest and insurance." The vessel left Hull on the morning of the 19th December, and at the time of so leaving bills of lading had neither been presented nor signed. Soon afterwards on the same morning the vessel grounded on the Middle Bank in the Humber,

and a little before noon became a wreck. Late in the afternoon of the same day the defendants presented the bill of lading to the plaintiffs at their offices, and the plaintiffs then demanded the advanced freight, saying that the payment of advanced freight was in consideration of the goods being received on board, and had no reference to the results of the voyage, and that therefore such advanced freight was payable to the plaintiffs, whether the vessel was lost at the time they required it or not. It was proved in evidence that on a previous occasion in a transaction between the same parties, where the charter-party was the same as in the present case, bills of lading had been presented after the vessel had sailed, and advanced freight required and paid. The question argued now was whether the plaintiffs were entitled to advanced freight under the circumstances, or whether the right to advanced freight was gone because there was a total loss of the vessel. *Held* (by Mr. Justice Charles), that the proper mode of looking at "advanced freight" was, that it was a payment made in consideration of the taking of the goods on board, and not for the safe carriage of them during the voyage, and that it was properly payable to the plaintiffs in the present case, although it had not been paid or demanded until after the loss of the vessel. *Judgment for plaintiff.—Smith, Hill, & Co. v. Pyman, Bell, & Co., High Court, Q. B. Div., 15 Nov.*

COMPANY.—Winding-up—Shares issued at a discount—Distribution of surplus assets—Rights of fully paid up and discount shareholders inter se.—A company was formed in 1857 under the Joint-Stock Companies Act of 1856, its registered capital being £40,000 in 4000 shares of £10 each. The business of the company was not carried on at a profit, and in 1861 its shares had fallen in value to £3. Under these circumstances the company passed a special resolution for the increase of its capital by the issue of 2016 additional shares, and for the issue of 984 of the original shares which remained unissued, and it was resolved that all these shares should be issued at the price of £3 per share, but should be regarded as fully paid up £10 shares, making the total nominal capital £60,160. Of the shares thus issued, 1631 were subscribed for. In 1889 the company passed a resolution for winding up. The company had no creditors, and the liquidator had a surplus of £25,000 in hand. A petition was presented by the liquidator for the direction of the Court as to the way in which this surplus should be divided among the shareholders. The holders of shares issued at a discount claimed to share in the assets equally with the original fully paid up shareholders. The fully paid up shareholders argued that the discount shareholders could only share in the assets after the fully paid up shareholders had received £7 each. *Held* (by Lords Justices Lindley, Brown, and Fry, affirming the decision of Mr. Justice North), that £7 each should be paid to the fully paid up shareholders in the first place, and the residue then divided between all the shareholders.—*Re Weymouth and Channel Island Steam Packet Company Limited, Ct. of App., 15 November.*

COMPANY.—*Petition—Foreign liquidation—Jurisdiction.*—A petition was presented by a creditor to wind up a company which was registered in England under the Companies Acts. The bulk of the property and assets of the company and its offices were situated in France, and the French Courts had made an order and appointed a liquidator. *Held* (by Mr. Justice Kekewich), that, the company being registered in England, and the petitioner being an English creditor suing in respect of work done, he was entitled to a winding-up order.—*Re Suresnes Racecourse Company Limited*, High Ct., Ch. Div., 15 November.

DIVORCE SUIT.—*Wife's petition—Cruelty—Refusal of decree.*—The wife petitioned for a dissolution of the marriage on the grounds of the alleged cruelty and adultery of her husband. The case came on before the Court itself on October 31, and was undefended. The adultery was established, but the learned judge ordered the case to stand over, for the purpose of giving the Queen's Proctor an opportunity to instruct counsel to argue the case on the point of cruelty. This was done, and the case came on for argument. It was contended, on behalf of the petitioner, that when a wife has at any time suffered conduct at the hands of her husband which would amount to legal cruelty, and subsequently evidence comes to the knowledge of the wife satisfactorily establishing the fact of her husband's adultery, that she is, upon proof of that adultery, entitled to a divorce without being required to show that there is any probability of a continuance of the cruelty, or even of the future prejudice to her health. In other words, if at any time during the married life a state of things existed which gave her a right to come to this Court for a judicial separation, and if subsequently to that state of things adultery supervenes, the Court ought to couple the two together, and is, under the statute, entitled and bound to give the relief sought by dissolving the marriage. The marriage took place in 1858, the husband being twenty-three or twenty-four, and the wife about seventeen years of age. The first few years were fairly happy. Then the husband committed adultery with more than one woman, and frequently flaunted his *amours* before his wife, told her that he liked this or that woman better than herself, and caused her an amount of mental worry and annoyance that caused her health to suffer severely. In 1870 a deed was executed, and the husband appeared to have strictly observed the terms thereof, down to the time that the present petition was filed. *Held*, that the plea of cruelty was not established, and that the petition must be dismissed.—*Beauclerk v. Beauclerk*, High Court, Prob. and Div. Div., 18 November.

SETTLEMENT.—*Wife's property—Ultimate trust for next of kin—"Die without having been married"—Second marriage.*—By a marriage settlement, certain funds belonging to the wife were settled in the events which happened upon trust for the wife for life, and subject thereto in trust for such person or persons, according to the statutes of distribution of the estates of intestates, as would at the

time of the failure of issue of marriage at the time of the decease of the survivor of the husband and wife, which should last happen, have been the next of kin of the wife "if she had died intestate and without having been married," to be divided between or among such persons, if more than one, in the shares and manner prescribed by such statutes for the distribution of the effects of intestates. The wife survived the husband, and there was no issue of the marriage. The wife subsequently remarried, and died leaving two children by her second husband. On a petition for payment out of the funds which had been paid into Court under the Trustee Relief Act, a question arose whether these children were excluded from the class of next of kin. *Held* (by Mr. Justice Stirling), that the children were not excluded, and that there must be a declaration to that effect.—*Re Arden's Settlement Trust*, High Court, Ch. Div., 22 November.

PRACTICE.—*Habeas corpus*—*Right of appeal*—*Judicature Act*, 1873 (36 and 37 Vict. c. 66), sec. 19—*Illegitimate child*—*Rights of mother*.—The Queen's Bench Division having directed that a writ of *habeas corpus* should issue to the defendant to bring an infant child before the Court in order that the Court might determine whether the child should remain in his custody, or whether it should be handed over to its mother or to persons nominated by her,—*Held*, by the Court, that an appeal lay to the Court of Appeal under sec. 19 of the Judicature Act, 1873. The case of *Bell-Cox v. Hakes* in the House of Lords (5th August 1890, not yet reported) distinguished on the ground (*per* Lord Esher, M. R., and Lindley, L. J.) that the question there was of the liberty of the subject, but in the present case the question was one of nurture and education, and as to who was to have the custody of the child; and (*per* Lopes, L. J.) that that case only decided that no appeal lay in the case of a discharge from custody under a writ of *habeas corpus*, as the Court could not order a re-capture. The mother of an infant illegitimate child voluntarily entered into an agreement with the defendant under which the child was to remain for several years at the defendant's institution to be fed, clothed, and educated. Eighteen months afterwards she was persuaded to remove the child to a similar institution under the management of Roman Catholics. *Held* (by the Master of the Rolls and Lords Justices Lindley and Lopes), that a mother of an illegitimate infant child has as much right to its custody as the father of a legitimate child, and she cannot by agreement absolve herself from her rights and duties towards it, and the Court is bound to give effect to her wishes unless it should see that she is unfit to have control of it.—*Reg. v. Barnardo*, Court of Appeal, 25 November.

SHIPPING.—*Compulsory pilotage*—*Merchant Shipping Act* (17 and 18 Vict. c. 104), sec. 353—*Merchant Shipping Amendment Act*, 1862 (25 and 26 Vict. c. 63), sec. 41.—Case stated under 20 and 21 Vict. c. 43. The appellant was master of a steamship, the *Menelaus*, and left London with a foreign cargo, and without any passengers, for

Holyhead, in order there to take up a pilot, who was a Liverpool pilot, and then to proceed on her voyage to Liverpool. In order to take up the pilot at Holyhead the ship entered the Holyhead pilotage district, and came within half a mile of the breakwater. The ship stopped just sufficient time to take up her pilot, and then proceeded on to Liverpool. The pilot who was taken on board the ship was not qualified for the Holyhead district, being a Liverpool pilot. The respondent, being licensed for the Holyhead district, offered his services to the appellant, but was refused. Besides taking up the Liverpool pilot, the *Menelaus* did not drop her anchor, discharge or load within the Holyhead pilotage district. The stipendiary magistrate at Holyhead convicted the appellant, on the ground that the *Menelaus* came within the limits of the Holyhead pilotage district for the purpose of taking in a pilot, and did take in such pilot within such limit, and was not a vessel passing through the said pilotage district within the meaning of 25 and 26 Vict. c. 63, sect. 41. *Held* (by Mr. Justice Day and Mr. Justice Lawrence, quashing the conviction), that the appellant was exempt from employing a pilot by sect. 41 of the Merchant Shipping Amendment Act, 1862, because the ship was passing through a pilotage district. —*Gregoy v. Jones*, High Ct., Q. B. Div., 29 October.

Sheriff Court Reports.

COUNTY OF CAITHNESS.

(SHERIFF THOMS AND SHERIFF-SUBSTITUTE HARPER.)

LILIAS DUFF *v.* GEORGE BRUCE.

Inlying Expenses for Illegitimate Twins.—*Held*, that full inlying expenses for each twin, unless in special circumstances, were not to be allowed, and the expenses for both fixed at one and a half of the ordinary allowance for a single birth.

Constitution of Debts.—Pursuer not entitled to bring action merely to constitute her debt, the defender being all along willing to pay.

In this action of filiation and aliment the defender admitted the paternity, had paid the pursuer a sum to account, and was willing to pay what might be found reasonable. These interlocutors were pronounced:—

“*Wick*, 27th October 1890.—The Sheriff-Substitute, having considered the debate and process, Finds in fact, (1) the defender admits being the father of the children for whom aliment is here asked: Ordains the defender to pay to the pursuer (1) the sum of £1, 10s. sterling as inlying expenses as upon 14th July 1890; (2)

the further sum of £1, 10s. sterling as inlying expenses as upon the said 14th July ; (3) the sum of £4 sterling per annum for the period of seven years from said 14th July ; and (4) the further sum of £4 sterling per annum for the period of ten years from said 14th July,—said sums of £4 to be paid quarterly and in advance for the said periods respectively, beginning the first quarterly payment thereof as upon the said 14th July, but under deduction of the sum of £5 sterling admittedly paid by the defender to the pursuer to account, with interest at the rate of five pounds per centum per annum on said sums, as they have fallen or may hereafter fall due till payment: Finds neither party entitled to expenses, and decerns.

E. ERSKINE HARPER."

"*Note.*—The Sheriff-Substitute has had no sufficient reason stated to him, and sees none, for allowing in this case a higher rate of inlying expenses or of aliment than is in use to be allowed in this county. The Sheriff-Substitute has found neither party entitled to expenses, because, although the pursuer was entitled to constitute the debt, the defender has succeeded in his defence that the pursuer's claim for aliment was excessive. The pursuer claims too much as inlying expenses, and the amount which the defender says he is willing to pay is too small.

E. E. H."

The defender appealed, and the Sheriff pronounced this interlocutor :—

"The Sheriff, having resumed consideration of this appeal with reclaiming petition and answers and whole process, Dismisses said appeal, and adheres to the interlocutor submitted to review, except as regards the decerniture for the sums to be paid by the defender, and the finding as regards expenses of process, which are hereby recalled: Finds that the defender is liable only in the sum of £2, 5s. of inlying expenses for the twins (a boy and girl) of which the pursuer was delivered, and interest of said sum from 14th July 1890, the date of birth, until the date of a payment of £5 by the defender to account, but of which the date is not condescended on by the pursuer: Finds that the balance of the said sum of £5 will fall to be credited to the defender in part payment of the first quarter's aliment of the twins and interest thereon, for which the defender has been found liable: Appoints the pursuer to lodge a state of the debt for which she seeks decree against the defender at the first quarterly term after the said payment to account is exhausted, in order that decree may be given against the defender: And finds the pursuer liable in the whole expenses of process to the defender, as the same may be taxed up to the date of final decree.

GEO. H. THOMS."

"*Wick, 15th December 1890.*

"*Note.*—There is a very imperfect record in this case. Not only is the important date when the payment to account was made omitted, but averments are wanting as to the sums concluded for as inlying expenses and aliment, which are not the sums allowed

in Caithness, and it is not said where the rates in the summons are allowed. The Sheriff-Substitute, in this state of the record, did right in allowing only Caithness rates.

"The great peculiarity of this case is, that it is a case of illegitimate twins, and the Sheriff-Substitute has allowed full inlying expenses for two children born at separate births. There is no allegation here that either of the labours was unusually protracted, or that any other specialty existed. The Sheriff was anxious to find out whether there were any precedents. The case of twins had not occurred in Caithness during his now more than twenty years of office. He asked nearly all the other Sheriffs whether they had had illegitimate twins to deal with. The only Sheriff who had had a case of twins was the Sheriff of Lanark. His predecessors had had such cases, and in two of these expenses as of two separate births had been allowed. It was not known whether there were special circumstances connected with these births, and they were old cases. The general *consensus* of opinion among the Sheriffs consulted was that, in ordinary circumstances, inlying expenses at the usual rate for one of the twins and at half the usual rate for the other twin were sufficient. The Sheriff agreed in that opinion, and has given effect to it in the above interlocutor.

"The Sheriff has given the defender expenses because he paid a sum to account, and the pursuer has failed in her contention as to rates. The Sheriff is not aware that 'the pursuer,' as stated by the Sheriff-Substitute, 'was entitled to constitute the debt,' especially where as here the father admitted paternity, and was willing to pay whatever was due. The doctrine of constituting debts belongs to a different branch of law.

"The necessity of the additional procedure, which will be taken in order that the Sheriff-Substitute may give a decree, has been necessitated by the way in which the pursuer has laid her action, and she must pay the expenses.

G. H. T."

Act. Cormack—All. Leith.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.



Editorial.

A Monopoly Menaced.—Mr. Littler, Q.C., is in a rage. He wrote to *The Times* of 22nd January to inform the world of the fact. The cause of his losing his self-control on this occasion is the Private Bill Legislation (Scotland) Bill now before Parliament. This English barrister cannot get words strong enough to express his ill-humour. "The Bill is mischievous, and I say unconstitutional." "I say deliberately the proposal is ludicrous." "This is worse than a useless, it is a most mischievous Bill." "The very worst Bill, in my judgment, that the present or the last Government ever produced." "It passes comprehension how such a measure could ever have been seriously put into a Queen's Speech." These are a few of Mr. Littler's references to a proposal which has met with very general approval throughout Scotland. He says, "I either have, or ought to have, some knowledge of the subject." We also were of that opinion until we read his letter. Having read it, we now hold the contrary opinion. This Englishman may know a few tricks of fence, and may have at his finger-ends the twists and turns of a by no means complicated machinery. But he certainly can know nothing of Scottish feeling on the subject, for he concludes his bad-tempered composition with this amazing piece of audacity:—"Its only friends, so far as I can learn, are some busy-bodies from the Royal burghs and some briefless advocates in

Edinburgh." How about its only enemies? Some party schemers in the Radical burghs and some parliamentary counsel in London! Mr. Littler, by the familiar figure (or fallacy) of anticipation, meets such an accusation as against his disinterested self. This is his modest statement:—"I suspect that the result would be that I should pecuniarily benefit, for no one supposes that in Scotland they will not, at all events for some years to come, seek the benefit, like all other suitors, of technical knowledge and experience;" and the public are respectfully informed that Mr. Littler's terms are up, and that the luxury of bringing him "to their own fireside" will cost a deal of money. He characterises the Commission, which is to be established by the Bill, as the worst that could be got for the particular purpose in view. "Number One," he says, "is to be a judge of the Court of Session. I doubt if any one of *them* (*sic*) ever put his nose (*sic*) in a Private Bill Committee. Many have never sat in Parliament, and even more than the English judges they go by rule and precedent." The last statement will be news to most people. For slipshod argument and boldness of assertion, Mr. Littler's letter preserves the best traditions of the London Parliamentary Bar. He never had a more hollow and preposterous cause to advocate, and he never made a greater mess of it.



Professor Williams, V.S., for the Defence.—Are veterinary surgeons legally entitled to appear on behalf of accused persons in Police Courts? It is our humble opinion that they are not. The daily newspapers report that on the 14th January, at the Leith Police Court, a waggon-driver, named Charles Rutherford, pleaded not guilty to a charge of having, on a certain day, in a certain place, cruelly ill-treated and tortured a horse under his care, by causing it to draw a waggon while lame and suffering from a severe sprain on the right fore-leg. "He was defended," says the *Scotsman*, "by Professor W. O. Williams, of the New Veterinary College, Edinburgh." We do not enter into the merits of the case. There was evidence, skilled and other, in support of the prosecution; Professor Williams was not successful in his defence; the presiding magistrate found the charge proven, and fined the accused

10s, with the alternative of seven days' imprisonment,—all of which is very satisfactory in its way, and calls for no comment. What we are puzzled over is how Professor W. O. Williams, of the New Veterinary College, Edinburgh, came to appear in the Police Court to conduct the defence of a prisoner. We should be glad to be informed of any authority at common law, or of any statutory provision, which gave the professor the right to appear in such a capacity. An accused person may conduct his own defence. If he does not wish to do so, he may be represented by a qualified legal practitioner. We have heard of some isolated exceptions to this rule in the Edinburgh Police Courts. Such exceptions, however, would not, we venture to think, stand the test of inquiry. Professor Williams's own explanation of his conduct does not seem to improve matters. According to the *Scotsman* report, he explained that he had been called as a witness in the case, but, on finding that no one was to conduct the case, he took up the task! The professor, apparently, gave evidence also; for he is stated to have said, in "addressing the Court at the close of the evidence," that there was a tyrannical body of men going about who were totally inexperienced in the management of horses, and the horse which had the cleanest tendon of any in the stable (a moderate form of assertion) had been stopped from work purely on these ignorant men's statements. We venture to suggest that Professor Williams should in future confine himself to discharging the duties of an expert witness, and that, should he on another occasion take up the task of defending an accused person, objection should be taken to his *locus standi*.



The Railway Strikes.—On the merits of the dispute between the railway employers and the railway employed we make no comments; nor do we speak of the interest which, from the standpoint of safety in travelling, the general public may have in certain of the claims made by the employed. With the rights and wrongs of these we have not at present to do. But, as a legal journal, interested in the just and due administration of the existing law, we must deplore many of the features of the recent strike. Criminal acts, grossly reck-

less and wicked, have been frequent, and call for exemplary punishment when guilt has been brought home to the perpetrators. Placing stones and other obstructions on the line, interfering with "points," throwing stones at passing trains, are instances of crime of a peculiarly dastardly and revolting nature. Then, too, riot, intimidation, molestation of workmen pursuing their calling, and the like, are all flagrant breaches of the existing law, and many such cases are alleged to have occurred during the past few weeks. Besides all these matters of a criminal kind, there are delicate questions of civil law, such as desertion of service. These latter are being fought out in the civil Courts; and no doubt existing rights and remedies are adequate as regards the parties directly concerned. But, looking to a placard paraded, presumably in the interests of those on strike, warning the public against travelling, as being in the circumstances extremely dangerous, it would seem to be a question whether the public have not in this respect a grievance too. Section 5 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86) provides that, "Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury, he shall, on conviction thereof," be liable to a penalty not exceeding £20, or to be imprisoned for a term not exceeding three months, with or without hard labour.



Knife and Fork Negligence.—If what we hear be true, a somewhat nice point in the law of contributory negligence was tried in Germany the other day. A citizen of that empire, while travelling on a railway, took on board at one station a luncheon basket, which he intended to deliver up empty at the next. In the midst of his enjoyment of his luncheon the train abruptly stopped, with the result that the sudden jerk caused this gentleman to inflict on his cheek a huge gash with a knife, which at the moment he had in close

proximity to his mouth. We should have thought that in a duelling country, where scars are cherished as marks of honour, and counted as scalps are by the Indian, this traveller would have welcomed such a mishap. He, however, sued the railway folk for damages; and in defence there was stated the plea of contributory negligence. It was ultimately decided that this plea must prevail; inasmuch as, although the traveller had a perfectly legal right to fill his mouth by means of his fork, he must be held to feed himself with his knife at his own risk and peril! Universal custom apparently counts as nothing in the Law Courts of Germany.

Special Articles.

REGISTRATION LAW OF 1890.

BY JOHN C. GUY, ADVOCATE.

No great question of principle has been involved in the decisions of the recent Registration Appeal Court. A number of cases, however, have been decided which will affect the interests of a large number of voters. The most important case decided was the case of *Falconer v. Lessels* (not yet reported). The decision in this case was to the effect that it is incompetent to combine the occupancy of a dwelling-house successively with the occupancy of lodgings. It thus follows that a person who may have been on the roll for years as a lodger, will be struck off the roll for a year if he takes a house and occupies it as a tenant. We apprehend that the same decision would follow if a lodger were to buy a house for his own occupancy. The *rationale* of the decision is, that the two kinds of qualifications are quite distinct, and are based on different enactments, and that they cannot be combined with one another, unless such combination is expressly provided by the Election Statutes. The statutes do provide for successive occupancy of different premises. This has been held to apply where the occupancy has been in both

cases that of a dwelling-house or other heritable subjects. It has also been held to apply where in both cases the qualifying subjects were lodgings. It has also been decided that it is incompetent to combine ownership with occupancy, and *vice versa*. This last rule was in a measure relaxed in burghs by the Reform Act of 1868 (31 & 32 Vict. c. 48), so far as regards dwelling-houses, that Act instituting the inhabitant-occupier franchise, which is defined to be occupancy of a dwelling-house, for the requisite period, under certain conditions, whether *as owner or tenant*. Now it is decided that occupancy of lodgings cannot be combined with any other kind of occupancy. Although the decision in *Falconer v. Lessels* shows a case of extreme hardship, and a case which must be of very frequent occurrence, it would be idle for us to dispute the legality of the decision. Indeed, we took the opportunity, in an article on "Anomalies of Franchise Law" (vol. xxxix. p. 402), to express an opinion on this very point, in conformity with the decision which has just been given. But the decision is the result of our franchise law being based upon a number of statutes which repealed very little, and each of which has introduced new provisions, without sufficient regard having been paid to the effect of those new provisions on those already existing.

The successive occupancy we have referred to only applies to successive occupancy within one constituency. Section 10 of the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), provides that "the occupation in immediate succession of different premises situate within a parliamentary borough, shall, for the purpose of qualifying a person for voting in any division of such borough in respect of occupation (otherwise than as a lodger), have the same effect as if all such premises were situate in that division of the borough in which the premises occupied by such person at the end of the period of qualification are situate." By implication, it would appear, therefore, that it is incompetent to combine occupation of lodgings in one division of a borough with occupation of lodgings in another division of the same borough. The Sheriff of the Lothians (Crichton) so decided this point, and it is unfortunate that the opportunity was not taken of having the point settled by the Appeal

Court. Probably the Sheriff's decision, on a strict reading of the statute, is correct, but there is obviously a flaw in the statute, which is capable of easy explanation, and it is possible that the Appeal Court might consider the explanation sufficient to exclude the implication. The lodger qualification in England is different in several essential points from the lodger qualification in Scotland. One of these differences is that in England the lodgings occupied for the qualifying period must be in the same house. In Scotland it is enough that they be occupied successively within the same constituency, or, in the case of divided boroughs, within the same division. It is obvious, therefore, that the framers of the statute (which applies to the whole United Kingdom) had this peculiarity of the law of England in view when they inserted the provision which we have quoted, and were either in ignorance of, or disregarded, the difference between the Scottish and English law on this point. At any rate, if the Sheriff's decision is correct, it follows, with apparently no reason for the distinction, that an occupant or inhabitant-occupier may move from one division of a borough to another without losing his vote, while a lodger in doing the same does lose his vote.

An important case was decided by the Appeal Court relative to the lodger qualification (*Gray v. Deuchar*, 1st December 1890, 28 S. L. R. 168). The point the Court had to consider was the construction of that part of section 4 of the Reform Act of 1868 (31 & 32 Vict. c. 48), which provides for the occupancy of lodgings separately and as sole tenant. The occupancy which the section enacts as necessary is occupancy "as a lodger in the same borough, separately and as sole tenant, for the twelve months preceding the last day of July in any year, of lodgings of a clear yearly value, if let unfurnished, of ten pounds or upwards." It was not disputed that the claimant was a lodger. He had the sole use or occupancy for the qualifying period of a back bedroom in a half-flat house, and the joint use or occupancy of the dining-room, drawing-room, and bath-room. The clear annual value of the claimant's rights of use or occupation aforesaid was admittedly sufficient, but the value of the bedroom alone was insufficient. The question for the Court was whether

the joint use of the dining-room, drawing-room, and bath-room by the claimant could be reckoned as part of a lodger qualification. The Court unanimously answered the question in the negative, Lord Kinnear expressing himself that "the right of a sole tenant to the exclusive occupancy of his lodgings excludes a landlord just as clearly as a joint tenant." Subject, therefore, to the statutory provision which enables two, but not more than two, lodgers to be enrolled as joint occupants of lodgings, provided the lodgings jointly occupied are of the annual value, if let unfurnished, of £20 or upwards, it follows from this decision that, no matter what the value of a person's lodgings may be, he is not entitled to be enrolled unless he has the sole and exclusive occupancy of so much of his lodgings as are of the unfurnished value of £10. We understand that this decision will reverse what has been the practice of the assessors, and that in future years a large number of lodgers who have enjoyed the franchise will be disqualified.

The Court decided two cases which bear on the unsettled question of double residence. These cases are *Smith v. Falconer*, 1st December 1890, 28 S. L. R. 165, and *Stewart v. M'Fadzen*, 14th December 1890 (not yet reported). In the former of these two cases, the claimant, who was the Sheriff-Substitute of Forfarshire at Dundee, claimed to be enrolled in respect of his being owner of a dwelling-house in Edinburgh, where his wife and family resided, and where he himself resided at certain times. Under the Act 2 & 3 William IV. c. 65, sec. 11, residence in the burgh, or within seven miles thereof, is an essential of the burgh franchise. But the Act 1 & 2 Vict. c. 119, sec. 5, provides that every salaried Sheriff-Substitute shall reside personally within his sheriffdom, and shall not be absent therefrom for more than six weeks in any year, or more than two weeks at any one time. The Court presumed that the Sheriff-Substitute was complying with the latter statute, and that his true residence was in Dundee, and held that his residence in Edinburgh was merely incidental, and that such residence did not comply with the provisions of the former statute.

In the case of *Stewart v. M'Fadzen*, the claimant's principal

residence was in Glasgow, where he resided with his family for eight or nine months of each year. He was tenant, however, of a dwelling-house in the county of Bute, where he resided for two or three months continuously each summer, and occasionally for a few days at a time. The rental of the dwelling-house was insufficient to entitle him to be enrolled under the £10 county occupancy franchise. The question which the Court had to determine, therefore, was whether the claimant was an inhabitant-occupier in the county of Bute. Lord Trayner, who gave the opinion of the Court, while reserving his opinion as to whether a man might not have two residences in the sense of the statute, held that his residence did not constitute sufficient residence to support his claim.

In the case of *Falconer v. Dunlop* (1st December 1890, 28 S. L. R. 167), a lodger who resided in his lodgings during nine months in the year, but was absent during the remaining three months, was held to have been resident during the statutory period. During the three months he was absent in the country, the other inhabitants of the house were also absent, and the house was shut up, but he had access to it at any time he desired.

These were all the cases of importance decided by the Registration Appeal Court of 1890. As we indicated at the outset, no very important principle is involved in any of them. But all of them are illustrations of the necessity for the codification and extension of the Scottish Law of Franchise and Registration.

IMPECUNIOUS LITIGANTS.

THE equal treatment of rich and poor litigants is a hard problem of jurisprudence. The infringement of a legal right entitles the person in whom it is vested to invoke the aid of a Court of law in vindicating that right; but, *per contra*, the person who is said to have infringed it, is entitled to protection against wrongful litigation when his adversary cannot repay the costs thereby incurred. Too much strictness in placing a curb upon impecunious litigants, may lead to the denial of

justice to a poor man; too great laxity in applying the curb may render the moneyed classes a prey to those whose love of litigation is in inverse ratio to their ability to pay for it. The law of Scotland offers a solution of this problem. The Courts are free to all; but the zeal of an impecunious litigant is tempered by two checks—the Remit to reporters to say whether he has a *probabilis causa litigandi*, and the Order to find caution for expenses. There was formerly a more powerful check than either, imposed by the dread of incarceration in virtue of the decree for expenses; but the practical abolition of civil imprisonment makes that measure no longer a terror to litigants of the penniless sort. Of the two checks we have named, the remit to reporters being possible only where the party chooses to apply for leave to sue or defend *in forma pauperis*, cannot be made available in the ordinary case, and therefore the restraint which is most generally useful is the order to find caution for expenses.

There are three great principles ruling this question which may be stated here to save repetition. *Firstly*, and most important, the granting or refusing a motion that a litigant be ordered to find caution for expenses, is an incidental step of process which is absolutely in the discretion of the Court. The judicial mind comes to the consideration of each case free and unbiassed, and, although the course of prior decisions is not overlooked, the judgment is governed by the justice and propriety of the case which is before the Court. The usual inquiry is, whether it is right and proper and less hard that one litigant shall be ordered to find caution, than that the other litigant shall be compelled to litigate with one who has not a penny to meet expenses. The answer to that inquiry depends on the circumstances of each case. *Secondly*, in the exercise of its discretion, the Court will also be guided by the interests of public justice, and will not be induced to make any order inconsistent with these interests on account of charitable considerations or representations of individual hardship. *Thirdly*, absolute impecuniosity is never taken as the sole ground for making a party find caution for expenses. The Court may pronounce such an order against an absolutely impecunious litigant, if his case is suspicious or disreputable, if its success is improbable, if his conduct of the cause has

been objectionable, if there has been *mora* in raising proceedings, or if any other matter transpires to influence the Court in the exercise of its equitable jurisdiction; but never solely because he is impecunious.

Subject to these fundamental rules, the result of the decisions on this subject may be summarised in the two following propositions:—

I. A litigant, who is divested of his means in consequence of his estates having been sequestrated, or of his being the subject of a decree of *cessio bonorum*, or of his having executed a disposition *omnium bonorum*, or of his having granted a trust-deed for behoof of his creditors, who has not received his discharge from a competent Court or other appropriate authority, and whose trustee declines to sist himself as a party to the action,—has usually been ordered to find caution for expenses.

- Exceptions:* (1) Where he is defending his person from arrest, his estates from sequestration, or himself against an action founded upon a serious charge, such as fraud.
- (2) Where he is vindicating his reputation from a slander uttered, or seeking reparation for bodily injuries sustained, both subsequent to the bankruptcy.
- (3) Where he is suing upon a contract entered into subsequent to and in knowledge of the bankruptcy.
- (4) Where he is suing his trustee for an accounting, or the trustee has otherwise a personal interest in the suit.
- (5) Where he is maintaining fairly a probable ground of defence, or is supporting on appeal a judgment in his favour pronounced in Court prior to his bankruptcy.
- (6) Where he is able, by documents or admissions, to establish a *prima facie* case.

II. A litigant, who is not divested of his means in the manner stated, but is merely impecunious, has not usually been ordered to find caution for expenses.

- Exceptions:* (1) Where he is a fugitive from his creditors.
- (2) Where his case is *ex facie* of a questionable nature.
- (3) Where success in his action is *ex facie* improbable.

- (4) Where he is suing an *actio popularis*, and is not the true *dominus litis*, but a mere screen put up to cover richer men.
- (5) Where he has applied for the benefit of the Poors' Roll, and the reporters have found that he has no *probabilis causa litigandi*.

These propositions are not arbitrary. There are intelligible principles underlying them, which are worthy of attention, as they appear to be frequently misunderstood. When a person becomes divested of his estate by bankruptcy, his trustee is vested in that of which the bankrupt is divested. If a right of property has been infringed, which prior to the bankruptcy was vested in the bankrupt, it is for the trustee, in whom after the bankruptcy the right is vested, to take such steps in a Court of law for the vindication of that right as he may deem expedient. The trustee may not choose to take any step in the matter, and in that case he is held to abandon the right which has been infringed, and the bankrupt may take it up. But that right, which has still to be established to the satisfaction of a Court, and the existence of which is so doubtful that the trustee declines to interfere for its vindication, is the only property which belongs to the bankrupt. If his action fails, he has nothing wherewith to pay his opponent's expenses. Hence the rule that the Court will generally order such a person to find security for costs. This principle is well illustrated in the case of *Thornton* (1845, 8 D. 87), where the pursuer had, in the disposition *omnium bonorum*, expressly reserved right to pursue that particular action. The claim sued for was his only asset, and, lest his suit should fail, he was ordered to find caution for the expenses. On the other hand, poverty of itself dissolves no right, and there are rights, other than rights of property, of which bankruptcy does not divest a man—such as the rights of personal freedom, of vindicating his reputation, of obtaining reparation for bodily injuries, of earning his livelihood, and of calling upon his trustee for an accounting. If a poor man applies to the Court for redress, or if a bankrupt seeks its aid in protecting one of those rights of which his bankruptcy has not divested him, the Court will be

unwilling to order either of them to find caution for expenses, unless there is something in the nature of the suit or the conduct of the litigant which makes such an order necessary. More especially, if a bankrupt is not pursuing but defending an action, the Court is in general reluctant to hamper him with such an order, unless his defence is improbable, or is a special one which throws a considerable *onus* of proof upon him, or where he has taken his case out of the hands of his trustee and persists in going on with a vexatious litigation, or where he challenges the validity of a document founded upon by the pursuer and thus places himself *in loco actoris*.

It has been argued that the application of these principles must, to some extent, depend on the question whether the ground of action has arisen prior or subsequent to the bankruptcy. As a general rule the question is immaterial, provided the bankrupt is undischarged, but a distinction has been drawn from the *nature* of the grounds of action. When the cause of action has arisen out of dealings, it is of no consequence whether such dealings took place before or after the bankruptcy, provided they were not transacted in knowledge of it. Even where the bankrupt has been discharged he has not been allowed to pursue an action founded upon dealings prior to his bankruptcy unless he has been retrocessed as regards that asset (*Graham*, 1871, 9 M. 798). There is, however, a difference made in the extent to which caution is ordered when the bankruptcy occurs after the litigation has begun. Under these circumstances it has been limited to the expenses incurred subsequent to the bankruptcy, for the reason that, previous to bankruptcy, the litigant was entitled to carry on the process, and did no wrong (*Ramsay*, 1847, 10 D. 234). When the cause of action has arisen, not out of dealings but from acts for which reparation is sought, the Court has held that the trustee is entitled to sist himself and claim the *solatium*, where the acts complained of happened prior to the bankruptcy (*Thom*, 1857, 19 D. 721). Where these acts happened subsequent to the bankruptcy the bankrupt has been required to find caution for expenses (*Love*, 1835, 13 S. 448).

A question is sometimes raised as to what is meant by

"undischarged." In the case of *Gilchrist* (1847, 10 D. 149) a number of the creditors had signed a minute consenting to restore the bankrupt to the management of his estate; but the device was of no avail. Seeing that the Act 47 & 48 Vict. c. 16, sec. 3, defines an undischarged bankrupt as one who has not received his discharge from a competent Court in Scotland, the answer to the question is sufficiently plain in a process of sequestration or *cessio bonorum*. In a voluntary trust the answer is provided by the terms of the trust-deed.

A few words may be added in regard to the practical application of the curb. In the case of an undischarged bankrupt the Court first orders the process to be intimated to his trustee. The latter may sist himself as a party to the action, or he may decline to do so. If he declines, an order for caution may be pronounced, when the Court thinks it will meet the justice of the case. Where the litigant is not bankrupt, but in great poverty, the Court has made an alternative order, that he shall apply for leave to sue *in forma pauperis*, with certification that, if he does not do so, or if he fails to satisfy the reporters that he has a *probabilis causa litigandi*, caution will be ordered (*Hunter*, 1874, 1 R. 1154). In either case, if an order to find caution is pronounced, the party must, within a limited time, find not only a cautioner but an attestor, who will certify the sufficiency of the cautioner. If the cautioner or his attestor dies, resigns, or becomes bankrupt, another must be found. The action will be dismissed or judgment given against the litigant, as the case may be, should he fail to discharge the duties laid upon him by the Court. In one case (*Oliver*, 1869, 8 M. 82) the opponent of an impecunious litigant induced the cautioner to resign, by working upon his fear of loss. His cleverness was misapplied. The Court refused to make a new order for caution, holding that there had been an improper interference with the cautioner, and in place of securing the dismissal of the action, the unhappy litigant lost the security for his costs.

It may be asked whether the law of Scotland has offered the best solution of this juristic problem. That question need not be answered here; but one fact may be pointed out for the benefit of any amateur lawyer who is prepared to

suggest several infallible schemes for meeting the difficulty : It is easy to put a bridle upon impecunious litigants, but it is not easy to keep the bridle from being made an instrument of oppression.

H. H. B.

Analysis of Authorities (" Impecunious Litigants ").

PROPOSITION I.

Galloway, 1822, 2 S. 41.
Manuel & Co, 1826, 4 S. 881.
Shepherd, 1829, 7 S. 680.
Lyell, 1829, 8 S. 153.
Swan, 1833, 11 S. 245.
Love, 1835, 13 S. 448.
A. B., 1836, 15 S. 158.
Thomson, 1838, 16 S. 1374.
Walker, 1843, 2 Bell Ap. 57.
Thornton, 1845, 8 D. 87.
Gilchrist, 1847, 10 D. 149.

Ramsay, 1847, 10 D. 234.
Mackersey, 1850, 12 D. 1057.
Oliver, 1869, 8 M.P. 82.
Horn, 1872, 10 M.P. 295.
Clarke, 1884, 11 R. 418.
Gray, 1884, 11 R. 1104.
Collier, 1884, 12 R. 47.
Teulon, 1885, 12 R. 971.
Stevenson, 1886, 13 R. 913.
Scott, 1886, 13 R. 1173.
Ferguson, etc., 1889, 17 R. 282.

1st Exception :—

Clark & Ross, 1813, 17 F. C. 294.
M'Intosh, 1826, 4 S. 775.
Robertson, 1833, 12 S. 70.
Hooper, 1850, 12 D. 1309.
Murray, 1856, 19 D. 44.

Weepers, 1859, 21 D. 305.
Stephen, 1860, 22 D. 1122.
Young, 1875, 2 R. 599.
Buchanan, 1880, 8 R. 220.

*2nd Exception :—*Heggie, 1855, 17 D. 802 ; Scott, 1885, 12 R. 1022.

*3rd Exception :—*Young, 1836, 14 S. 794 ; Bell, 1862, 24 D. 603.

*4th Exception :—*Stephen, 1860, 22 D. 1122 ; Burnett, 1877, 14 S. L. R. 616 ; Ritchie, 1881, 8 R. 747.

*5th Exception :—*Taylor, 1833, 6 W. and S. 301 ; Bell, 1840, 2 D. 1460 ; Lang, 1858, 31 S. J. 19.

*6th Exception :—*M'Alister, 1873, 1 R. 166 ; Scott, 1885, 12 R. 1022 ; Thom, 1888, 15 R. 780.

PROPOSITION II.

Nicol, 1848, 11 D. 214.
Potter, 1870, 8 M.P. 1064.
Macdonald, 1882, 9 R. 696.

Thomson, 1882, 9 R. 1101.
Lawrie, 1888, 16 R. 62.
Macrae, 1889, 16 R. 476.

*1st Exception :—*Samuel, 1844, 6 D. 1259 ; Maxwell, 1847, 9 D. 797 ; Carne, 1851, 13 D. 1253.

*2nd Exception :—*Clarke, 1884, 11 R. 418.

*3rd Exception :—*Carne, 1851, 13 D. 1253 ; Scott, 1886, 13 R. 1173.

*4th Exception :—*Jenkins, 1869, 7 M.P. 739.

*5th Exception :—*Hunter, 1874, 1 R. 1154 ; Robertson, 1890, 28 S. L. R. 18.

NOTE.—Some of these decisions proceeded upon several grounds, and illustrate more than one branch of this Analysis. They have, therefore, been classified according to the leading points of which they are illustrations.

PRIVATE BILL LEGISLATION.

THE tone of the Opposition to the second reading of the Private Bill Procedure (Scotland) Bill is far from creditable. It is a great misfortune that party exigencies, and the wire-pulling of certain railway magnates and London parliamentary lawyers, should have converted what might have been useful criticism of the Bill into unreasonable opposition on the part of a number of the Scottish members of Parliament. There are, no doubt, parts of the Bill open to criticism, and on these the Government are prepared to receive amendments. Most of such moot points are discussed from a point of view, in the main friendly to the Bill, in the following letter recently addressed by the Secretary of the Scottish Private Bill Legislation Committee to the Provost of Dundee, commenting on a report on the Private Bill Procedure Bills of the last and of the present sessions, prepared by Mr. Hay, the Dundee town-clerk. Mr. Hay's report is embodied in the letter :—

EDINBURGH, 13th January 1891.

The Honourable The Provost of Dundee.

SIR,—I received your favour of 31st ultimo, and also a letter from the town-clerk enclosing a report upon the Bill of last year, which Mr. Hay tells me is still under consideration of the Town Council. It is a matter of regret to the Scottish Private Bill Legislation Committee, on whose behalf I had the honour of communicating to you the arrangements for the deputation which waited upon the Lord Advocate on Friday last, in reference to the question of Private Bill Legislation, that a public body of the importance of your municipality (while approving of the principle of taking evidence on Private Bills at the locality interested) should not have taken part in a deputation otherwise so influential and so representative of Scottish opinion. The deputation was attended on behalf of nearly every important municipal and commercial corporation in Scotland by their representatives on the Scottish Private Bill Legislation Committee, or by members specially appointed for the purpose. I enclose a report of the proceedings. In view of the national

importance of the subject, I am instructed to communicate to you the following memoranda on the town-clerk's report.

The report is divided into three paragraphs, and these are dealt with *seriatim*. The first paragraph is as follows :—

“In section 3 the Chairman of Committees in Parliament has power to determine whether the powers sought in the Bill are of exceptional character or magnitude, or that they do not exclusively relate to Scotland. If he shall so declare on any of these particulars, then the Bill cannot be dealt with in Scotland under the new mode, but must go on at Westminster as at present. This power is too extensive, and may deprive the public of the benefit of the measure in many very important matters in which the people would be most closely concerned. There might also be railway influences to press for the exceptional consideration of their Bills, and probably in this way defeat the principal object of the measure.”

This paragraph, as it stands, is not applicable to the present Bill, though it was so to the measure of 1889. No power is given to the Chairman of Committees by the present Bill to determine whether the powers asked by any private Bill are of exceptional character or magnitude so as to prevent it from coming within the scope of the new system, and with regard to the provision in the present Bill that the private Bills to be referred to the proposed Commission must exclusively relate to Scotland, the views presented to the Lord Advocate in the report which was handed to him on behalf of the deputation as setting forth their criticism of the present Bill are exactly those expressed in the town-clerk's report. . . .

The second paragraph of the town-clerk's report is as follows :—

“I think the appointment of paid Commissioners unnecessary ; and if any Commission is held to be necessary at all, one or two judges of the Court, or one judge along with the Sheriff of the county, could do the duty, in the same way as two judges at present hear evidence and report on Estate Bills, or discharge other special business remitted to them ; and I see no necessity for the Board, as constituted by the Bill, nor for a Scotch establishment in Edinburgh, but the judges could hear the evidence, and their report could be

lodged with an officer in the Scotch Secretary's Department, and sent by him direct to the Clerk of Parliament. It is indeed a very general opinion, and I think rightly so, that for all local improvements, including water, gas, harbour amendments, provision for these works might very properly be made by the authority of the municipal and local authorities on the principle of the works allowed at present by way of special powers as contained in the General Police and Local Acts, and considering the advertisements required, and the power of review allowed in these orders, there is ample protection to all interested. In this way many private Bills in Parliament and great and unnecessary expense on the ratepayers would be prevented."

It is here suggested: (1) That the proposed Commission should in its constitution be composed of lawyers only, and (2) that municipal and local authorities should be entrusted with the functions at present performed by Parliamentary Committees in connection with private Bills regarding all improvements, including water, gas, and harbour amendments. With regard to (1), it is submitted for consideration that in investigations so wide and involving interests so many and various as those requiring to be made into the expediency of private Bills, more than mere legal knowledge is required. A purely legal tribunal is no doubt well adapted for such special inquiries as are involved in Estate Bills, where the question is one of disentangling a complicated entail or the like; but in connection with the many and various interests involved in a private Bill, the practical acumen of men of business, and the special acquirements of men of skill, are not less indispensable than legal training. It is difficult to see how these can be obtained, and how the Commission can be given such an independent position as to keep it above all suspicion of interest, unless its members are paid servants of the country. Further, the town-clerk's report is in error when it refers to a proposal to set up a "Scotch establishment in Edinburgh;" no such proposal is made. With regard to (2), the suggestion offered in substance refers to an extension of the existing Provisional Order system for taking land or getting aggressive powers. It must be observed that the present Bill in no way interferes with the existing Provisional Order system; it

merely substitutes the Commission for the present Select Committees of both Houses. This Commission might well be utilised to improve the Provisional Order system in a way in which Select Committees cannot be. There is no reason why opposed Provisional Orders, or such as require investigation beyond the means of the department in charge, should not be remitted to the Commission to be set up under the present Bill. The "works allowed at present by way of special powers as contained in the General Police and Local Acts" to municipal and local authorities relate only to operations of a minor character (such as the straightening of existing streets), with regard to which the public interest is obviously paramount; but these belong to an entirely different category from such operations as those contemplated in most private Bills, with regard to which the balance between private right and public expediency has first to be ascertained. The question whether a corporation or an individual should get powers to take the land of others compulsorily, or to act in any other way contrary to the common law, should be determined by some tribunal like the Commission, capable of doing justice between promoters and the lieges generally.

The third paragraph of the town-clerk's report is as follows :—

"There is a power in section 12 to authorise the Houses of Parliament to remit back a case for further inquiry, and report by a motion in the House. If this power is retained there may be motions made on behalf of discontented or defeated and influential parties, which if granted may make the expected advantages of the measure of little or no effect, but, on the contrary, a source of delay and unnecessary expense to all concerned. Let the report of the case be dealt with by Parliament just in the same way as the report of the Select Committees at present. There does not seem any reason for a change in this respect. And I regret that the Bill does not deal with an evil in regard to the expense of initial proceedings in these private Bills:—(1) The expense of long notices of a Bill causing great outlay in advertising, and also the number of the advertisements, and which form not an inconsiderable item in the costs; (2) the obligation to serve extensive notices on the owners and

occupiers of premises, and the mode of serving same by agents or assistants, constitutes another large item in costs. A short abstract notice of the Bill to be advertised, and the Bill to be seen at a public office, and the allowance of registered notices by post would greatly reduce the expenses, and against which there could be no real valid objections. Indeed the Bill makes no improvement as regards the great and needless initial expenses of notices connected with the present system."

In this paragraph, (1) objection is taken to section 12 of the present Bill, and the suggestion is made that the reports of the proposed Commission should be dealt with by Parliament in the same way as the reports of Select Committees at present; and (2) it is further objected that the present Bill makes no improvement regarding the expense of certain initial proceedings on private Bills. With regard to (1), while it is possible that the new system may be exposed to the danger pointed out, it must be remembered that the same remark applies to any proposal for devolution. The object of my Committee has all along been to have the reports of the proposed Commission treated with the same respect as the reports of a Select Committee; but the attainment of this object must depend on the disposition of Parliament, not on the provisions of any Act. The procedure proposed by the present Bill in the case of reports by the proposed Commission is exactly analogous to that at present in use regarding the reports of Select Committees. Against this possible danger a great safeguard exists in the fact that members of the House of Commons are practically on strike against service on Private Bill Committees,¹ and may thus be expected to be unwilling, when once relieved of the burden by the proposed Commission, to undertake the like work in another form by a practice of upsetting the Commission's reports. Further, in order to provide against this danger, my Committee, in the report handed by the deputation to the Lord Advocate, strongly urge that the Commission should include a member of each House of Parliament *ex officio*.

¹ See Report of Evidence taken by Joint Select Committee of Lords and Commons, 1888, per Sir John Mowbray, Chairman of the Committee of Selection, p. 484.

These members would be of invaluable service in defending, from their respective places in Parliament, any report of the Commission which might be unnecessarily impugned. With regard to (2), the desirability of curtailing the expensiveness of the existing system is one of the objects my Committee has always kept in the forefront. The initial expenses complained of in the town-clerk's report are due to the provisions of the existing parliamentary Standing Orders; and on this point the views of my Committee, as set forth in the report handed to the Lord Advocate by the deputation, are in perfect accord with those expressed by the town-clerk in his report. On the general question of expense, the following obvious advantages lie on the side of the new system proposed in the present Bill:—(a) Instead of two successive inquiries into the same private Bill before a Committee of each House respectively, there will be only one in the locality concerned; (b) the proposed Commission will sit in or out of session with appointed diets and full business hours. This will obviate one of the great causes of expense at present, viz. the limited time allowed for private Bill business each session, and the consequent hurry and pressure leading to the employment of an extravagant number of counsel, and the long attendance of witnesses and parties in London. . . .

I have the honour to be, Sir, your most obedient servant,

JAMES AVON CLYDE, *Hon. Sec.*

MAILLS AND DUTIES.

I'm new to the buirds o' the Parliament Hoose,

But my notions rise heich owre the riggin' o't,

Sae I dinna sit doon, like my yearlin's sae dooce,

But I spread oot my goon, an' I craw unco' croose,

"Gie's a case, an' I'll win't wi' the priggin' o't!"

I ken that I'm cleverer far than the lave,

For my faither has aften-times said it:

"Ye'll be a great lawyer, my only son Dave!

Ye'll slide frae the 'oo'-seck, na, into your grave;

Ye'll keep up the faimily's credit!"

A week or sae efter I sattled my fees—
 Tho' my brass-plate has not yet been paid for—
 I was sittin' bewailin' the scarceness o' pleas,
 An' wonnerin' whan I'd begin to practeese,
 When in cam' the loon I had pray'd for:

A clever young writer, wha gae to the puir
 The haill o' his time an' his talents—
 Conduckit their pleas withoot favour or fear—
 His prospec's o' winnin' them werena aye sure—
 He was ane o' the puir-awgint callants.

I gie'd him a dram, whilk the loon seem'd to like,
 (It's best to keep in wi' the bodies,)
 Syne he shoo'ered oot his papers, like snaw aff a dyke,
 While his words they cam' bizzin' like bees frae a bike,
 An' his vice rase on high—like a cuddy's.

Oor victim, it seem'd, was a Mrs. MacHitt,
 Wha's man had run aff to Kirkcaldy;
 He would neither come back to his hame at Parkfit,
 Nor alloo her to jine him, nor help her to flit,
 Tho' she wantit to bide wi' the laddie.

We discuss'd a' the p'int's o' the puir woman's case,
 Alang wi' a pint o' Glenlivvet,
 Till the writer-loon gat unco wuld i' the face,
 While his tongue rattl'd on at a terrible pace,
 An' his heid grew as ouch as a divot.

Syne I yokit on *Fraser*, an' warsl'd through *Bell*,
 In *Erskine* I stuck my proboscis;
 An' whan at the dawnin' the mornin' licht fell,
 I'm bound to confess that I couldna weel tell
 Whilk was the competent process.

I was geyly hard ca'd till I happen'd to licht
 On a form whilk ayont a' dispute is,—
 It was clearly inventit to keep us a' richt,
 An' we've gi'en the defender a deil o' a fricht,
 Wi' a summons o' MALES AND THEIR DUTIES.

Correspondence.

(To the Editor of "*The Journal of Jurisprudence*.")

BANKRUPTCY EXAMINATIONS IN GLASGOW.

SIR,—I am glad to see that you have at last called attention to the disgraceful laxity which prevails in the Glasgow Sheriff Court, in the matter of bankruptcy examinations. With some persons the system there adopted is a direct encouragement to commit perjury, but, as you point out, such perjury must go unpunished. In one case which fell under my own observation a number of years ago, in the ordinary Court, when all pomp and circumstance were dispensed with, a witness who had been examined went home to his friends and told them that he had been asked some questions in a private room, and that he had not told the truth; but if he were properly examined, he would tell another story.

While Home Rule is sleeping, if not dead, perhaps Dr. Cameron, who has taken an interest in bankruptcy, will, on behalf of his own constituency, assist the Lord Advocate to put a stop to this abuse.—I am, etc.,

L. A.

SIR,—As one who has been frequently a bankrupt, and who hopes to be so again, I wish to protest against your unwarrantable interference and your fault-finding with the practice of the Glasgow Sheriff Courts in regard to bankruptcy examinations. Bankrupts are a large and important class in the community, and surely, in fairness, their comfort ought to be considered. The proceedings as conducted in Glasgow are formal enough as it is. We desire no change; and I hope that a new horror will not be added to the already formidable troubles of deliberate insolvency by the presence of a Sheriff on the occasion of our "having to explain."—

I am, etc.,

BANKRUPT.

Obituary.

MR. CHARLES MACLAREN ROBSON, M.A., W.S. (1890), died on 25th December, at the age of twenty-six.

MR. JOHN LOWE, Solicitor, Coupar-Angus, died on 28th December, in his seventy-seventh year.

MR. THOMAS REID, Solicitor, Moffat, died on 18th January.

The Month.

Mature Counsel for the Poor.—Six advocates are appointed annually, at the anniversary meeting of the Faculty, to act as counsel for the poor who are otherwise unrepresented. The custom of recent years has been to go straight down the Faculty Roll, taking the members in turn. At the annual meeting last month, the requisite number were appointed. Owing to the increasing number of intrants each year, the standing of the counsel for the poor has been steadily getting higher. A simple piece of arithmetic enables us to state that the gentlemen last admitted to the Faculty will be counsel for the poor in the year 1905 A.D.!

* * *

A Wily Junior.—One day last month two well-known advocates in the Parliament House held a confidential colloquy over a certain reclaiming note in which they were respectively junior and senior counsel for the reclamer. Both had advised against reclaiming; both were persuaded of the utter rottenness of their case; and each vowed to the other that nothing on earth would induce him to appear at the calling. The note was called. No appearance for the reclamer; a due pause on the part of the Court; note dismissed. Then dramatic entrance of junior counsel with well-simulated hurry; apologies and explanation that he had heard

of the calling only that instant, when he had been attending an advising in the Outer House, and he had straightway cast all else to the winds and rushed in to do their Lordships' pleasure. Later in the day the senior remarked to a friend: "Cunning scamp that Q.! Just before the Division case he heard a judgment in a case of mine called; the monster intercepted my clerk, told him not to bother getting me, as I was engaged, but that he would sit himself to oblige me! But when the Division macer came to force me in there, I tracked the miscreant to the Lord Ordinary's Bar, and bundled him in to his rotten reclaiming note."



The English Bench.—The present condition of the English Bench is this: Of its twenty-eight members, thirteen are between fifty and sixty years of age, twelve between sixty and seventy, and three (Lord Esher and Justices Hawkins and Denman) are over seventy. As regards service, Sir James Hannen has served twenty-two years, Mr. Justice Denman eighteen, the Lord Chief-Justice and Baron Pollock seventeen, and Lord Justice Lindley fifteen.



Detention and Bail.—It is quite time that the Lord Chancellor and the Home Secretary administered a rebuke to some of our magistrates for the unreasonable manner in which they refuse bail to accused persons on remand or on committal for trial. Mr. Justice Cave the other week, at the Liverpool Assizes, called attention to the case of a person who had been detained in prison four months without bail; when put upon his trial, he was immediately acquitted by the jury. In another case the offence charged was so trivial that a week's imprisonment would, in the opinion of the learned judge, have been ample punishment; yet the prisoner had been detained without bail nearly three months. Three cases of this sort came before the judge at the present assizes; and he declared it to be monstrous that accused persons, under such circumstances, should not be admitted to bail. Mr. Justice Hawkins has made similar observations.—*Law Times*.

Irish Registration Appeals.—A good many appeals have been heard by the Irish Queen's Bench Division from decisions of revising barristers at the recent revision Courts, some of which are well worth noting. In *Quinlan v. M'Carthy* an objection was alleged against certain claimants that they were in receipt of outdoor relief during the qualifying period. The objection, however, in form only referred to the "nature of qualification," as filled up in the claimants' list, and it was held that an objection on the ground of outdoor relief could not be thus raised. In *Kelly v. Chambers*; *M'Connell's case*, M. claimed in respect of a bedroom and use of sitting-room furnished in a hotel. It was proved that M. took the lodgings, which were of the requisite value, by the year, and arranged with the manager of the hotel that, in the event of his being absent on a vacation, the manager might put any one requiring a bedroom into his bedroom, but that the room should be vacant at his disposal whenever he returned to the hotel. There was no reduction of rent in consequence of this arrangement, and in pursuance of it persons occupied the claimant's bedroom occasionally during his absence of four weeks in the qualifying year, but on his return he immediately went into occupation of the room. The Court held that the arrangement with the tenant was solely of a permissive character, and did not affect the occupation of the claimant, who had never lost control of the qualifying premises. In *Kelly v. Chambers*; *Gilliland's case*, G. and M. claimed as lodgers in respect of separate bedrooms, and joint use of a sitting-room in the same house. The rooms were taken at different dates, but they were conjointly of the requisite value, and the lodger last in occupation had held during the qualifying period; the claimants were determined to be entitled to the franchise as joint occupiers. In *Boyland v. Lloyd*, the appellants, B., A., and F., were occupiers of certain adjoining premises, separately rated respectively at £10; £13, 10s.; and £12, 5s. A. and F. resided in the house of B., and the farms were worked in common. The Court held that there was a separate tenancy and a separate rating and occupation, and that the mode of working the farms did not operate to deprive them of the franchise. In *Magee v. Hanrahan*, the appellant was objected to as rated

occupier of premises which it was proved he had left ; but the objection to him was impugned as bad, because it was left at the premises in question, although to the objector's knowledge the elector lived elsewhere. The Court decided that, as the objector knew the correct address of the elector, the objection should have been sent there, and allowed the appeal. In *Sefton v. Lunny* ; *King's case*, K. let the grazing of eight acres, portion of the qualifying premises, to H. for six months from the 1st May 1890. Under the letting agreement H. had no right to exclude K. from the premises let, but K. had not the right to put any more cattle than arranged into this portion of the premises, or otherwise to interfere with it during the six months. During the tenancy H., with the consent of K., put up an entrance gate to the ground, one key of which was given to K., and the other kept by H. The eight acres in question were not rated separately from the rest of the qualifying premises. The Court held that K. had not parted with the occupation of any portion of the qualifying premises, and allowed his vote. In *Torish v. Wynne* the claimant was a national schoolmaster residing in the school buildings, which had been exempted from rating. He was returned as occupier of the house, but objected to on the ground that he was not rated. The Court of Appeal ordered his name to be retained on the list. In *Casey v. Riddle* the voter had left his residence and gone to Glasgow to obtain employment with the intention of returning, but not at any fixed time. He left his family in possession of the qualifying premises. The revising barrister held that, as the object of his absence was not temporary, but was indefinite, he was disqualified. But the Court of Appeal decided that the voter did not cease to inhabit, and allowed the vote. In *McCullagh v. Graham*, the voter during three months of the qualifying period was in a lunatic asylum. Held that he was disqualified. And in *Holland v. Chambers*, A. claimed as an inhabitant occupier. He was a seaman on board a tugboat which sometimes went outside the bounds of the borough for which he claimed to vote, but he never signed articles of agreement. The Court of Appeal by a majority reversed the decision of the revising barrister, and struck him off the list of voters.—*Law Times*.

His Plea.—Magistrate (to prisoner): "You are found guilty of meeting the plaintiff in a lonely street, knocking him down, and robbing him of everything except a valuable gold watch which he had with him. What have you to say?"

Prisoner: "Had he a gold watch with him at the time?"

Magistrate: "Certainly."

Prisoner: "Then I put in a plea of insanity."

* *

Interesting to Mules.—It has been decided in the United States (*Fisher v. Pennsylvania Railroad Company*, 126 Penn. St. 293) that where a mule on his way home from work unattended is on a railway track at a highway crossing, the railroad company is under no obligation to sound the whistle to warn him of an approaching train. We should have thought that an animal of sufficient intelligence to go home from his work unattended was entitled to this amount of consideration from the engine-driver.

* *

Corrupt Practices.—Asked in the House of Commons on 23rd January whether a promise made by a parliamentary candidate in the course of a parliamentary election, that he would in future employ only trade-union workers, when he had previously employed non-unionists, was contrary to the provisions of the Corrupt Practices Act, the Attorney-General said: "Upon the facts stated in the question—by which I mean a candidate who had previously employed non-unionists, promising that in future he would only employ trade-union workmen—upon those facts, and assuming that such a promise was made in order to influence voters, I am of opinion that such a promise is contrary to the provisions of the Corrupt Practices Act."

* *

Barons of the Exchequer.—The recent death of Baron Huddleston leaves Baron Pollock the only possessor in England of the ancient title by which for over eight centuries the judges of the Court of Exchequer have been known, who

is thus legitimately entitled to the appellation of "the last of the Barons." Curiously enough, in Ireland likewise one representative of that judicial order likewise survives in the person of Chief Baron Palles, who still worthily maintains the traditions of the defunct tribunal.

The Court of Exchequer, so called from the chequed cloth, *scaccharium*, resembling a chess-board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters, was a Court of record established by William the Conqueror as part of the *aula regia*, and intended principally to order the revenues of the Crown, and to recover the king's debts and dues. It consisted of two divisions,—the receipt of the Exchequer, which managed the royal revenue, and the judicial side, which embraced a Court of equity and a Court of common law. A reminiscence of its functions in controlling the public revenue still survives in the title of the chief fiscal officer of the State, the Chancellor of the Exchequer, who in old times regularly had his place on the Bench during its sittings. By one of those curious legal fictions so frequently met with in the development of Anglo-Norman jurisprudence, that a suitor who desired to invoke its aid was a debtor to the king, and by reason of the defendant's default was not able to discharge its obligation, that Court gradually, by the issue of a writ known as a writ of *quo minus*, acquired jurisdiction to adjudicate in all common law litigation between subject and subject, although the dispute had really nothing to do with the revenue or the sovereign. So firmly had this jurisdiction been established in the reign of Edward III., that when in the twenty-second year of that monarch it was petitioned in Parliament that erroneous judgments in the Exchequer might be reversed in the King's Bench, the petition was refused. The ancient mode of procedure in the Exchequer appears to have been that, whenever it was necessary to call any of the royal debtors to account, they were summoned by the Lord Treasurer or Chancellor of the Exchequer before the Barons for the hearing and determining of the indebtedness. And hence the term "Baron" as the appellation of judges of the Exchequer seems to have arisen; for inasmuch as a large proportion of the king's debtors were

of the rank of Barons, a title which after the Norman Conquest replaced that of the Saxon Thane, and a maxim of Norman jurisprudence required that a man could only be tried by his peers, it was necessary that the tribunal before which the debtor was arraigned should consist of Barons. Hence we find, from the earliest records of this Court, that the judges who there presided were Barons of the Kingdom and parliamentary Barons. Indeed, as is pointed out in Coke's Institutes, the Chief Baron and other Barons held their position by a more fixed estate (it being an estate for life) than the justices of either Bench ; for whereas the latter held their offices but at will, the former had them granted *quamdiu se bene gesserit*, and the same authority goes on to remark that the Barons of the Exchequer are the Sovereign Auditors of England, for if a man assign auditors to a bailiff or receiver to account, and the auditors will not allow just and reasonable allowances, but commit the bailiff or receiver to prison, such prisoner may have an original writ of *ex parte talis* returnable before the Treasurer and Barons of the Exchequer for his relief in that behalf. We receive, too, from the Mirror of Ockham, a curious account of the building of a new Court of Exchequer in the time of Edward I. The Exchequer, it seems, in those times was an ancient building and weak, and fourscore and one persons (whereof the Abbott of Westminster and forty-eight of his monks were part) brake into the receipt and feloniously robbed the king of a hundred thousand pounds, "*ad damnum inæstimabile*," saith the record. "All these fourscore and one were indicted for this felony, and committed to the Tower of London, and this was the occasion of the building of both these parts of the Exchequer."

The ancient oath to be taken by Barons of the Exchequer bound them to charge and discharge all manner of people, as well poor as rich ; "that for highness, nor for riches, nor for hatred, nor estate of no manner of person or persons, nor for any deed, gift, nor promise of any person, the which is made to him, nor by craft, nor by ingen, he shall let the king's right ;" that the king's need he shall speed before all others ; "that neither for gift, wages, nor good deed he shall layne" (*i.e.* hide), "disturb, nor let the profit or reasonable

advantage of the king, in the advantage of any other person, nor of himself; that nothing he shall take of any person for to do wrong or right, to delay or to deliver the people that have to doe before him, but as hastily as he may them goods to deliver without hurt of the king, and having no regard to any profit that might thereof to him be therein, he shall make to be delivered;" that he should redress or declare any wrong to be done to the king, and keep the king's counsel secret in all things.

After various inroads had been made in the jurisdiction of the Court of Exchequer, as by taking away its powers as a Court of equity, that great legal leveller, the Judicature Act of 1873, incorporated its functions, whether as a Court of revenue or of a common law Court, indiscriminately in those of the High Court of Justice, and made it a division of the High Court; and by Order in Council of December 1880, under section 32 of that Act, the Exchequer and Common Pleas Divisions were abolished, and consolidated into the Queen's Bench Division.—*Law Times*.



Prayer and Verdict.—The newspapers give us an account of a verdict induced by prayer in a recent murder case in Kansas. The jury seemed unable to agree, and the judge brought a clergyman into Court, sent for the jury, and subjected them to prayer (or possibly an address), in which a good deal was said on the immortality of the soul. The jury then retired, and almost immediately returned with a verdict of guilty. That judge must be a "Christian scientist" or a "faith curer." But the verdict is ever so void. A somewhat similar case is *Shaw v. State* (in Georgia), 40 Alb. L. J. 102, where the bailiff took the jury to prayer-meeting pending the trial, and before submission. The conviction was reversed. So we believe it has been held of a prayer-meeting held in the jury room.—*Albany Law Journal*.



For the Defence.—Three pickpockets were caught at Liverpool Street Station *in flagrante delicto*. Defence: They had lost their way in the fog, and were feeling their way. Good!

It reminds us of the Irishman who stole a horse. Defence: He picked up a bit of rope in the road, and was he to blame that the horse at the other end of the rope would follow him home? Or another Irish one, where a man was charged with stealing a pig. Defence: He found the pig outside his fence trying to break through, so as you must always drive a pig the opposite way you wish him to go, he pulled piggy by his tail on to his field. Was he to blame that piggy didn't go the other way? And yet another. A man charged with stealing a leg of mutton from a butcher's shop, and a dog from another man. Defence: That he saw the dog sniffing at the mutton, so to save the meat in the shop he took the leg of mutton, held it close to the dog's nose, and so tempted him away from the shop. And yet another—but, no; we can put in no more of your stories, articulated one! We mean our stories!—*Law Notes*.



Judicial Innocence.—We are quite willing to believe that our honoured judges are as “unspotted from the world” as babes unborn; but that they are so absolutely verdant as the following anecdote would seem to show, we hesitate to accept. “Some amusing stories,” says the *Graphic*, “are told of Mr. Justice North’s want of knowledge of the world. In a case which he tried when he went on circuit, it was stated that the prisoner used a meaningless adjective, common among the lower classes. In his summing up, Mr. Justice North innocently drew the attention of the jury to the admission of the prisoner that blood was upon his garments.”



Mother’s Custody of Illegitimate Child.—It may be more or less known that the father of a legitimate child has such a right to the custody of that child that he cannot, as a rule, absolve himself by agreement from that right; but the inalienable right of a mother to the custody of her illegitimate child is probably less known. There are some statutory provisions by which, on a separation, parents can agree to give up the custody or control of the children to the mother, to which we do not mean to refer here (see *Simpson on*

Infants, 2nd ed., 154 *et seq.*). An illegitimate child is, in the eyes of the law, *nullius filius*; but, in spite of that, the law in this respect recognises natural rights, though they are of an illegitimate kind. The Court of Appeal, in *Reg. v. Barnardo*, have decided that the voluntary agreement into which a mother of such a child entered with the philanthropic doctor, as to the child's remaining several years in his institution, could be revoked by her, and that the Court would give effect to her wishes, unless it should be seen that she is unfit to have control of it. The paradox lies in the fact that the law recognises a relationship which, in its very terms, is one outside the law.—*Law Times*.



Libelling by a Law Report.—An interesting case on the law of libel so far as it relates to the publication of proceedings in Courts of justice, which, of course, includes proceedings at Petty Sessions, has recently been decided by the Court of Appeal. The case in question is only a part of a lengthened litigation, and may be only a midway to still further litigation; but it so closely concerns all judges and justices of the peace, that it is well worth following, and may yet yield much valuable guidance. The point is, not whether judges or justices who, in their judgments on cases, give fragmentary and one-sided accounts of the point they decide are liable to an action. The result is not considered, according to the present state of the law, possible. The point is whether the publishers of newspapers which contain such judgments are free from liability to third persons who may conceive themselves to be thereby libelled. Though judges and justices are well known to be privileged from liability when acting in the honest exercise of their vocation, yet it will be to them a source of disquietude if third parties, who publish the statements and decisions of such judges, as these are given by the judges themselves, are to be punished by actions for damages. In such an event, judges could scarcely help feeling that they had not done their duty efficiently if such a consequence were to follow their acts, as that third parties should suffer for what seem the judges' own shortcomings.

It has now been long considered to be well settled, that the proceedings at Petty Sessions, when published in newspapers, are in the same position as the proceedings of the High Court. But probably we have been too hasty in assuming that this is completely so. There was a leading case, of *Lewis v. Levy*, E. B. E. 537, decided in the time of Lord Campbell, which involved the point whether a newspaper proprietor was protected against an action for publishing a mere preliminary hearing or application to justices. Previous cases rather showed that it was libellous for publishers to report these preliminary hearings. In the case of *Lewis v. Levy*, a pawnbroker had been charged before a magistrate with perjury, and the charge was dismissed, and the pawnbroker sued the newspaper proprietor for publishing a report, and relied on the law being as he contended, namely, that as it was only a partial and preliminary proceeding, and he complained of some of the details as libellous, he was entitled to damages. The Queen's Bench, after taking time to consider, delivered an elaborate judgment to the effect that, if the report was fair and correct, no action lies against the publisher. But it is to be noticed that Lord Campbell did not go the length of holding that a report of everything that takes place before justices is necessarily privileged. He made, among other things, the following useful observations:—"No distinction can be drawn between a Court of *pie poudre* and the House of Lords sitting as a Court of justice. As to magistrates, if, while occupying the bench from which magisterial business is usually administered, they, under the pretence of 'giving advice,' publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in an alehouse." And that learned judge called attention to the circumstance as important—that, in that case then before him, the justices had dismissed the charge, having jurisdiction to hear it.

The dictum of Lord Campbell as to justices dealing with matters not within their jurisdiction, and which might be used against much of what is done at Petty Sessions, was to some

extent modified by a later case, of *Usill v. Hales*, 3 C. P. D. 319, where the very case occurred of justices entertaining a matter over which they had no jurisdiction. Three men had applied to a police magistrate for a summons against the plaintiff, a civil engineer, for their wages, and, on hearing their story, he came to the conclusion that he had no jurisdiction, though he said, "on the face of the application, the men had been badly treated." A fair report of this application was given in the newspapers, and the master sued the proprietor of a newspaper for libel, and the main question came to be whether the report was actionable because the magistrate had no jurisdiction. The Court came to the conclusion that, as the magistrate had jurisdiction to inquire whether the facts brought the case within his jurisdiction, whatever report of the result might be given, provided it was fair, was not actionable. And this was said to be good sense, for it is often difficult to know whether a matter comes within the jurisdiction of justices without some inquiry into the facts; and the mere result cannot make any difference, so far as a newspaper report goes. A reporter cannot tell what is or is not within the jurisdiction, and it was right that his report should be privileged like other reports of judicial proceedings.

The novelty of the case involved in *Macdougall v. Knight*, which on a former action on the same libel is reported in 14 App. C. 194, is, that the libellous act consisted in publishing only a correct copy of the judgment as delivered by the judge who decided the case, but which judgment, according to the plaintiff, gave a one-sided and imperfect account of the evidence. The main question was, whether the report of a judgment as delivered by a judge without any other or fuller account of the facts and evidence may be sued upon as libellous. The circumstances were such as may often occur in the course of ordinary business. The defendant Knight was an auctioneer in Bath, who had been sued in the Chancery Division by the plaintiff Macdougall for breach of contract and misrepresentation. The action was tried for five days, and in due time decided by North, J., who, as judges often do, gave a lengthened judgment, and an account of what he considered the important points. The defendant was so pleased at

succeeding that he forthwith had a correct copy of the judgment printed, and he circulated the copies among his customers by way of vindicating his own character. The plaintiff, however, maintained that certain passages of the judgment gave a misleading account of the litigations, and left out facts and evidence which, if stated, would have shown the plaintiff's character in a different light. Hence the action for libel brought for publishing the judgment without at the same time giving a fair account of the evidence left out by the judge.

The judge who presided at the trial of this case seemed to think that if the report of the judgment was correct, and was published honestly by the defendant in order to protect his reputation, this was a good defence. The jury found for the defendant, but a new trial was moved for. A Divisional Court refused a new trial. The case then went to the Court of Appeal, which also refused a new trial; and the Lords Justices all held that it was unnecessary to ask a jury whether a judgment delivered by the judge was fair and accurate; and, moreover, that it would be most mischievous if parties were to go behind the judgment and try and make out that it did not give a correct account of all that it was necessary to know. Not content with the three judgments against him, the plaintiff next went to the House of Lords, where the steps in the case were sifted more carefully; and though the House also decided against him, he obtained some encouragement from two of the law lords, who said, in effect, that if his points had been raised and put more correctly to the jury, the plaintiff might have succeeded. The Lord Chancellor and Lord Bramwell were the two judges who took this view. Lord Halsbury, L. C., said that the plaintiff was entitled to contend before the jury that the judge had drawn erroneous conclusions from the evidence, for a judgment was not necessarily a privileged document. "If," said his lordship, "a learned judge's judgment or summing up to a jury did not, in fact, give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, I think the publication of such partial, and, in that respect, inaccurate, representation of the evidence might be the subject
* an action for libel, to which the supposed privilege in what

was said by a judge would be no answer." Lord Bramwell also said that the publication of the judgment without any of the evidence could give the reader no correct means of judging of the whole case; and he was not prepared to say that there would not be a good cause of action for such publication. And if the plaintiff had insisted before the judge and jury that though the report of the judgment might be accurate, still it was not a fair report of the proceedings at the trial, he should have succeeded. While these two law lords expressed a decided leaning towards the plaintiff, the other three law lords said nothing definite on the point, and the plaintiff failed in the House of Lords because the right points had not been taken at the trial and at the right time.

After that decision of the House of Lords the plaintiff seems to have tried to have the right point raised by a new action. But a formidable obstacle was in his way, for a second action on the same libel could scarcely be tried with any prospect of success, and a plea of *res judicata* is always popular with the judges of every Court. The plaintiff endeavoured to make good his second action by singling out passages in the judgment which were not, strictly speaking, before the Court in the first action, and alleging that these were defamatory. The defendant took the usual step of applying to the Court before trial to dismiss the action as frivolous, on the ground that the matter had been already decided. The Divisional Court, however, were in his favour, and thought that, provided he paid the costs of the former action, he should be allowed to proceed with the second action. This led to an appeal to the Court of Appeal.

In the Court of Appeal the first and main point was, whether the first judgment was *res judicata*, and, therefore, a bar to the second action. All the three Lords Justices were satisfied that there could not be two separate actions arising out of one and the same libel. A libel could not, they said, be severed, and different actions founded on each limb and member. It was one and inseparable, and could not be twice sued upon. But the Court naturally said that even if a second action had been competent, it could not succeed, because it was not the law that the publication of a judgment without more was actionable. On the contrary, they all held that a

judgment delivered by a judge must be taken to be privileged, if the report was correct, and that it would be indecent and mischievous to allow parties to go behind it, and try and make out that it did not give a fair account of the subject-matter. The Lords Justices were not at all shaken or embarrassed by what had been said in the House of Lords; they thought that at the most there were only doubts entertained by two out of five law lords, and that the precise point had not been discussed and decided there. Hence we may fairly expect that this case will again reach the House of Lords, and elicit a more exhaustive and conclusive decision than it met with before.—*Justice of the Peace.*



Improved Judgments.—A recorder of the lore of lords tells his readers that the reports would have appeared sooner "were it not for the time which has been consumed in the revision of the judgments." Were judges as bad then as they are said to be now? At a future date it may be possible to set out side by side a certain judge's "Englysche as she is spoke" and his judgment as it appears after the reporter has revised it, and the judge has struck out the sentences which even he cannot understand. Judges differ as much on this head as reporters do in their revising habits. From all accounts Lord Justice Bowen's judgments—even the unwritten ones—not only do not require, but actually suffer from, alterations. Lord Hatherley, on the other hand, required a lot of revision. This was established in the Court of Appeal one day when Sir George Jessel and the present Master of the Rolls were sitting together. One of the counsel, commenting on a judgment of Sir W. P. Wood, said that the report was probably not exactly what he said, but his judgment corrected and altered by himself. "I don't believe it," said Brett, L. J., "I don't alter mine, and I don't think Lord Hatherley altered his much." Sir G. Jessel said: "I often alter mine, and I have heard that Lord Hatherley revised his own a good deal. What do you say, Mr. Ince?" Mr. Ince said he had been once a reporter in the deceased judge's Court, and he could testify to the fact that Lord Hatherley did occasionally alter his judgments." Brett, L. J., said: "Perhaps he altered a

word or two, but not thoughts." "Oh yes, he did," said Sir George, "the sentences used to come out—whole pages of them, thoughts and all."—*Solicitors' Journal*.



Playing many Parts. — "Talking about justices of the peace," said a well-known lawyer, "I heard the other day of a justice, a German with an unpronounceable name, up in Franklin County somewhere, who presided in a case brought by himself for divorce from his wife. After testifying in the case himself and hearing all the evidence, I'll be hanged if he didn't throw himself—or I mean his case—out of Court, on the ground of insufficiency of evidence."

"Well, that's pretty good," responded another eminent member of the Bar; but what do you think of a justice who acted in the dual capacity of judge and jury? It was up in the country somewhere, in a case of horse-stealing, I think. The lawyers on both sides agreed to dispense with the 'twelve good men,' and requested the judge to act as jury. He took the request literally. Mounting the Bench, he considered for a long time, and finally consented. He then began the proceedings. Leaving the Bench, he filed himself into the jury-box, had himself sworn by the clerk, and heard the evidence. When an objection was made or a law point raised by the lawyers, the 'jury' left the box, mounted the Bench, and passed on it as judge, returning to the jury-box in time to hear the testimony. After the evidence was all in, he wrote out his instructions as judge, and handing it to one of the attorneys, requested him to read it to the jury. After listening to the instructions in his capacity of jury, he had himself conducted from the room by the Sheriff, and locked up in the jury-room to consider the case and prepare a verdict."

"How long did he stay out?"

"Six hours."

"What was the verdict?"

"He reported that the jury couldn't agree, and as judge he discharged himself."—*Green Bag*.

Reviews.

The Partnership Act, 1890, with Notes: Being a Supplement to A Treatise on the Law of Partnership. By The Right Hon. Sir NATHANIEL LINDLEY, Knt., LL.D. Ed., one of the Lord Justices of Her Majesty's Court of Appeal. Assisted by Sir W. CAMERON GULL, Bart., M.A., of Lincoln's Inn, Barrister-at-Law, Vinerian Scholar in the University of Oxford, 1883; and WALTER B. LINDLEY, M.A., of Lincoln's Inn, Esq., Barrister-at-Law. With an Introduction and Notes on the Law of Scotland, by J. CAMPBELL LORIMER, LL.B., Esq., Advocate. London: Sweet & Maxwell. Edinburgh: Bell & Bradfute. 1891.

THE Partnership Act of last session imperatively called for the publication of a handbook on the subject, and one could not have been issued in better form than the joint work under review. None, certainly, could have appeared with names carrying more authority in this branch of the law than do those of Lord Justice Lindley and Mr. Campbell Lorimer in their respective countries. The annotating of this important statute is, in our opinion, extremely well done; and we have nothing but praise for the concise and lucid introduction, the part of which applicable to Scotland is from Mr. Lorimer's pen. The book is excellent. In all humility, we venture to express regret—captious though it may seem—that throughout the Notes, J., LL.B., Campbell, Esq., Lorimer, Advocate (we beg pardon if the arrangement of designations on the title page has confused us), should have used the form “Scotch” law instead of the more euphonious “Scottish,” or the time-honoured “Scots.” Perhaps, however, we blame the wrong man. Mr. Lorimer may not be responsible for the marginal notes. This may be the province of Walter, of Lincoln's Inn, B., Esq., M.A., Lindley (again our brain whirls); and it is only fair to state that in the Introduction, Mr. Lorimer, LL.B., Campbell, makes use of the form “Scottish.”

Lectures on the Growth of Criminal Law in Ancient Communities. By RICHARD R. CHERRY, LL.D., Barrister-at-Law; Reid Professor of Constitutional and Criminal Law in the University of Dublin. London: Macmillan & Co. 1890.

THIS is an interesting book. The author traces historically the manner in which Criminal or Penal Law developed itself among ancient societies. He points out the striking similarity between the early institutions of very distant races as regards this department of law; and, with the view of showing that such similarity did not arise from the adoption by one nation of the laws or institutions of another, but rather from the inherent principles of human nature, the legal systems selected for treatment are far apart from, and independent of, each other. These systems are the Brehon Laws of Ancient Ireland, the Hebrew Laws as exhibited in the Old Testament, the Mohammedan Law, the Roman Law, and the Anglo-Saxon and Early English Laws. "Nothing," says Professor Cherry, "illustrates so much the complete contrast between modern and ancient ideas on legal subjects as the study of this branch of law historically. The existence of law without any sovereign authority—without any sanction or recognised tribunal—seems to us almost a contradiction in terms. Yet it was out of such a state of society that law developed itself in all its branches, gradually and slowly. In the study of Criminal Law, we really have a test of the validity of the historical method. We can easily understand how such matters as the laws of inheritance and contract arose from custom, for even to the present day we recognise, in some degree, the binding force of custom in those branches of the law; but it is difficult to believe that Criminal Law could have originated in the same manner. Criminal Law naturally seems, even in its earliest stages, to be a restriction upon custom—a system of commands necessarily, we would suppose, imposed by some political superior, to restrain the practice of customs which were disapproved of, rather than to sanction those already observed." His object is, therefore, really twofold: viz.—to show that the origin of Criminal Law, as well as of other branches, was in

primeval custom ; and also to point out the traces of primitive ideas which remain in later developments of Criminal Law. The work, we may remark, has interest not for the lawyer alone, but for the general, scarcely less than for the scientific reader.

Studies National and International. By JAMES LORIMER.
Edinburgh : William Green & Sons. 1890.

THE *Studies National and International* will give to all who knew him a very pleasant recollection of Professor Lorimer. No doubt his chief claims to distinction will ultimately rest upon his larger works—The Institutes of Law and The Institutes of the Law of Nations ; but no one can fully understand his character nor, we think, fully understand his theory of law, who has not studied his fugitive writings. It was Professor Lorimer's custom, as the Prefatory Note states, at the beginning of each session to give to his class a lecture upon some topic of current public interest. This task was well-suited to the bent of his mind. In spite of his philosophical speculations, he never ceased to take a keen interest in all public questions—even, indeed, when they were of only local interest. He, no doubt, used to tell his class not to waste time in reading the daily papers ; but it is more than doubtful if he himself followed his own advice. At any rate, a mere list of the *Studies* shows that during the tenure of his office he took a lively interest in public events ; and one train of thought that was never absent from his mind, was how lawyers could and should influence them. This train of thought was closely connected with his main subject. He had to lecture to young lawyers on the law of nature, and these lectures, and others which might also have been published, give in outline his idea of how the law of nature could be practically applied. They must not, however, be criticised as complete studies of the subjects they treat of. What they were really intended to be, were so many examples of how such subjects ought to be treated. Holding also, as he did, the opinion that for speculative purposes the method of treating a subject was more important than the subject itself, it could not but result that his facts were sometimes

inaccurate and his conclusions unpractical. Bearing these considerations in mind, every one can read the volume before us with pleasure and profit. These considerations also avoid the necessity of any elaborate criticism of the views expressed in the lectures. Besides, his main contention, that lawyers have other interests and duties than that of being counsel and agent for litigants, is thoroughly true, and although it may be called a platitude to state it, yet in this busy age it is well to have it brought home to the mind in every possible way. Take, for example, his lecture on "Politics as a Profession." It may be true that the payment of members of Parliament is open to objection, and that proportional representation is unworkable, still his remarks on the qualifications necessary for a legislator are well worthy of the consideration of all thinking men. Professor Lorimer's philosophical position and his work as a jurist have been elsewhere referred to, and though the "Studies" could quite well afford a text on which to discuss the ultimate problems of law, that is not necessary. His lectures on current subjects can be treated by themselves. No one can read them without enjoying them; all must be struck with the originality of his ideas and the versatility of mind which their author displays; and every one must regret that he has not been able to devote more space to the discussion of the many interesting questions he raises. The interest of the book is also increased by having as a frontispiece a photogravure of Mr. Lorimer, taken from the portrait of him by his son.

English Decisions.

NOVEMBER—JANUARY.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

COMPANY.—*Winding-up*—*Validity of mortgage of uncalled capital.*
—A company in 1882 obtained an overdraft from their bank on the security of a promissory note by M. and G., two directors; and a resolution was passed by the directors indemnifying M. and G. A subsequent note was also given by M. and G. to the bank. In 1886 M. and G. executed guarantees in favour of certain

railway companies for sums which might become due to them from the company. In March 1886 the directors, in pursuance of a resolution to that effect, assigned by way of mortgage (subject to a prior mortgage) the "uncalled-up amounts of £4 per share on the 5000 shares of the company" by way of indemnity to M. and G. against all loss and damage by reason of their giving the guarantee mentioned. The company had gone into liquidation. M. and G. had been called upon to make payments to the bankers and to the railway companies, and they claimed the benefit of their security. The validity of a charge on uncalled capital of the company given by way of security for money borrowed was established by the Court of Appeal (44 Ch. Div. 534). *Held* (by Mr. Justice Stirling), as regarded the promissory note, that the overdraft being clearly a borrowing of money, the transaction was in substance a borrowing of money on the security of the uncalled capital of the company; also, as regarded the guarantees, that, upon the construction of the Memorandum of Association, the directors had power to issue securities founded or based upon the uncalled capital of the company for any legitimate business purpose of the company, and that the indemnifying of a director was such a purpose, and therefore that the mortgage was valid, and that the claim under it must be admitted.—*Re Pyle Works Limited*, High Court, Ch. Div., 18 November.

WILL.—Power—Failure of appointees.—By the will of E. M., certain personal estate was given in trust for E. L. M., an infant, for life, for her separate use without power of anticipation, and after her death for such persons as she should by deed or will appoint. By a settlement made on the marriage of E. L. M., still an infant and a ward of Court, with the sanction of the Court under the Infants' Settlement Act, E. L. M. appointed that the estate subject to the power should, subject to her own life interest under the will, go to and become vested in the trustees of the settlement upon trust for her separate use during the joint lives of herself and her husband, with remainder to the survivor for life, and subject thereto upon the usual trusts in favour of the children of the marriage, and in default of children as E. L. M. should appoint, and in default of appointment for the persons who would have been entitled to her personal estate under the Statutes of Distribution if she had died intestate and without having been married. E. L. M. died shortly after the marriage still an infant without children and intestate. E. L. M. was an illegitimate child, therefore there was no one who could take under the ultimate trust in default of children. *Held* (by Mr. Justice North), on an originating summons taken out by E. L. M.'s husband, that the effect of E. L. M.'s execution of the power by the settlement was to make the property part of her estate for all purposes, and not only so far as to carry out the trusts of the settlement, and the persons entitled under the settlement having failed, the property belonged to her husband.—*Scott v. Hanbury*, High Court, Ch. Div., 20 November.

TRUSTEE.—Unauthorised investment.—The plaintiff was a beneficiary under the will of one Ayres, who died in 1856. The defendants were the executors of the sole trustee of the will. In 1877 the trustee invested £2719, part of the trust fund, in the purchase of forty shares in a corporation called the London Assurance. In 1888 the shares were sold by his executors for £627 less than the amount originally paid for them. The will of Ayres authorised the investment of trust funds in (*inter alia*) “the stocks, shares, or securities of any company incorporated by Act of Parliament, and paying a dividend.” The company was constituted in the following manner: By the Act 6 Geo. I. c. 18 (a public general Act), which imposed the penalty of *præmunire* on persons misusing obsolete charters, the Crown was enabled to incorporate two companies for carrying on the business of marine insurance, with limitations in the charters which could not be imposed in a prerogative charter. One of the two companies incorporated in consequence of the Act was the London Assurance, whose charter was issued in June 1720, with the limitations authorised by the Statute. In April 1721 a fire insurance company was incorporated by prerogative charter under the name of the “London Assurance of Houses and Goods from Fire.” The charter provided that the court of directors of the London Assurance should be the court of directors of the fire insurance corporation. Various Acts of Parliament were passed from time to time recognising the two corporations, and in 1830 a private Act (11 Geo. IV. c. 74) was passed, incorporating a new corporation, called “The London Assurance Loan Company,” composed of the two existing companies. In 1853 a private Act (16 Vict. c. 1), the London Assurance Consolidation Act, 1853, was passed, which in effect amalgamated the three companies. It consolidated the stock of the companies, and gave the members of the fire companies the same privileges as the members of the London Assurance, and gave that corporation extended powers. The question was whether the estate of the deceased trustee was liable to make good the loss which had resulted from the investment. *Held* (by Mr. Justice North), that, having regard to all the Acts, it was impossible to say that the investment was a breach of trust for which the trustee ought to be made liable.—*Elve v. Boyton*, High Ct., Ch. Div., 26 November.

SHIP.—Charter party—Payment of hire in case of breakdown.—The respondents chartered a ship of the appellants for a time charter, at so much per month. The hire was to continue during the whole time, the owners to keep the ship in repair. The charter party contained a provision that “in the event of loss of time from breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of the hire shall cease until she be again in an efficient state to resume her service.” On a voyage from A. to H. her machinery broke down, and she was compelled to put into P., and a tug was sent out to bring her home.

On her arrival at H. the machinery was repaired while the cargo was being discharged. The owners claimed hire from the time she left P. till she was discharged. *Held*, that no hire was payable for the voyage from P. to H., but that the time occupied in discharging should be paid for. Judgment of Court of Session in Scotland (in 16 R. 843) affirmed with a variation.—*Hogarth v. Miller & Co.*, House of Lords, 1 December.

COMPANY.—*Prospectus—Misrepresentation—Onus of proof.*—The directors of a mining company issued a prospectus which contained a statement that full reports on the property had been prepared for the directors by engineers. The prospectus contained extracts from the report of D., one of the engineers, and stated that the reports had convinced the directors that the property was a rich one, and that they had no hesitation in recommending the shares to the public as a genuine investment. The plaintiff, relying on the words of the prospectus, which he understood to mean that the engineers who made the reports had been instructed by the directors to report to them on behalf of the company, and relying particularly on D.'s report, took a number of shares. The company was not successful, and the plaintiff brought an action against the directors for damages caused by his having been induced to take shares by untrue statements in the prospectus. At the trial it was proved that none of the reports had in fact been made on instructions from the directors, and that D., in making his report, was at least to some extent acting on behalf of the vendors of the property to the company. *Held* (by Mr. Justice Romer), that the statement, as the plaintiff understood it, being untrue and material, the defendants were liable in damages to the plaintiff, and without any obligation on his part to show that the reports were in fact exaggerated.—*Angus v. Clifford*, High Court, Ch. Div., 1 December.

NUISANCE BY NOISE.—*Proprietary club—Boxing contests—Crowds—Whistling for cabs—Music and singing—Injunction.*—A proprietary social and sporting club was established in Gerrard Street, Soho, to promote boxing contests within the club, and also to provide concerts and other entertainments for the members at late hours of the night. On the nights of the boxing contests, large and noisy crowds collected in Gerrard Street, cheering, hooting, and whistling, and did not disperse until early in the morning. Cabs for departing members were summoned to the club by a shrill whistle, from midnight up to 6 A.M. Music was also kept up occasionally till an early hour in the morning. The owner and occupiers of a house adjoining this club brought an action against the proprietor for an injunction to restrain the alleged nuisance in respect of (1) the boxing contests, which attracted the crowds; (2) the cabs and whistling; (3) the music. *Held* (by Mr. Justice Romer), upon the evidence, that a nuisance had been proved in respect of the crowd and cabs; that the proprietor of the club was responsible for such nuisance, as he was not using his premises in an ordinary way. An

injunction must go to restrain him from so conducting his business as to cause a nuisance by noise in these two respects.—*Bellamy v. Wells*, High Ct., Ch. Div., 1 December.

MASTER AND SERVANT.—*Agreement with tramway conductor—Forfeiture of wages.*—The plaintiff became a conductor of the defendant company on the terms amongst others that, for a breach by him of the rules of the company, the company's manager might decide that wages owing to him might be retained by the company as damages for the breach. The plaintiff, having been dismissed by the manager for a breach of the rules, brought an action in the County Court to recover wages due to him. After the action was brought, the manager, without hearing anything the plaintiff might wish to say, signed a printed form of certificate, which he had filled in with the plaintiff's name and the amount of the wages due, and which declared the wages forfeited. On appeal to the Queen's Bench Division, the Divisional Court gave judgment for the defendant company, considering themselves bound by the *London Tramways Company v. Bailey*, 3 Q. B. Div. 217. *Held* (by Lord Esher, M. R., and Lords Justices Lopes and Kay), that the certificate was no defence to the action, as the manager had not given the plaintiff any opportunity of being heard on the question of forfeiture.—*Armstrong v. South London Tramways Company*, Court of Appeal, 2 December.

SHIP.—*Collision—Fog.*—*Held*, affirming Court of Appeal (14 P. Div. 172), that there is no rule of navigation that where those in charge of a vessel in a dense fog hear a whistle or foghorn near at hand, they are under no circumstances justified in altering their helm before seeing the other vessel.—*Re The Vindornora*, House of Lords, 5 December.

AGREEMENT IN RESTRAINT OF TRADE.—*Construction—Unreasonable covenant.*—By an agreement dated in April 1887, and made between the plaintiffs, who carried on the business of manufacturers of a food preservative known as "Frigiline," under the style of "The Food Antiseptic Company," and the defendant, it was agreed that the defendant should become the traveller and assistant of the plaintiffs at a salary, and that he should call upon and solicit orders for all articles and commodities in the way of the plaintiffs' business as antiseptic manufacturers; that one week's notice on either side should terminate the agreement, and that, in the event of such termination, the defendant should not for or on account of any employer, or on his own account, at any time, either by himself or in partnership with any other person or persons or firm, call upon or directly or indirectly solicit orders from "or in any way deal or transact business" with any person or firm who, during the continuance of the agreement, should be customers of the plaintiffs, or any future successors of the Food Antiseptic Company, or any of the successors in business of such company. The agreement was terminated by a week's notice, and the defendant subsequently

entered the employment of the Freezall Food Preservative Company, and solicited and obtained orders from some of the plaintiffs' customers for a food preservative called "Freezall," which he represented had the same effect as "Frigiline." Upon a motion for an injunction in an action by the plaintiff to restrain the defendant from acting in breach of the agreement: *Held* (by Mr. Justice Chitty), that, giving the agreement a reasonable construction, the word "business" in the clause, by which the defendant agreed not to in any way deal or transact business with any of the plaintiffs' customers, meant business of a similar kind to that carried on by the plaintiffs, and not business of any kind, and that the agreement was not unreasonable; and injunction granted restraining the defendant from doing any of the acts in breach of the agreement.—*Mills v. Dunham*, High Ct., Ch. Div., 5 December.

CHEQUE.—*Negotiability—Crossing—Bills of Exchange Act, 1882, secs. 8, 35, 73.*—Where it is intended that a cheque shall not be negotiable, it must be distinctly and unmistakeably stated on it. Whether a cheque payable to order or bearer can be made not negotiable in any way except by writing "not negotiable" across it, *quære*. S. gave a cheque to M., which he sent to his bankers, the N. bank, to be placed to his credit. The cheque was payable to M.'s order, and was crossed "account of M., N. bank." The bank placed the amount to M.'s credit, and allowed him to draw on account of it before the amount had been paid to them. On presentation at the bank of S., the cheque was dishonoured, which left M.'s account with the N. bank overdrawn. As M. did not refund the amount, the N. bank sued S. for the amount of the cheque. *Held* (by Lords Justices Lindley, Bowen, and Fry, affirming decision of Mr. Justice Day), that the words written across it did not render the cheque not negotiable, and it having been sent to the bank to be placed to the credit of M., and M. having been allowed to draw on account of it, the bank were *bona fide* holders of the cheque for value in due course, and could sue S. for the amount.—*The National Bank v. Silke*, Ct. of App., 10 December.

COPYRIGHT.—*Dramatising a novel*—3 and 4 Will. IV. c. 1533, 1, 2—5 & 6 Vict. c. 45, sec. 24.—This was an action by the trustees and executors of A., and was brought to restrain defendant, a theatrical manager, from performing a play which the plaintiffs maintained was an imitation of a drama adapted by A. from his novel. An interim interdict had been obtained. The action in question was whether the drama published by the defendant was in substance a copy or a colourable imitation of the drama published by A. Both plays professed to be a dramatic representation of the novel. Many of the characters were the same in both plays, but some of the characters were different. The defendant's play had some characters which the plaintiffs had not. The dialogue of the different characters was similar, as the two dramas were taken from the same novel, and the general plot was the same. The defendant relied on the case of *Toole v. Young* (L. Rep. 9 Q. B. 523), where it

was laid down that the author of a novel was not protected against having his novel put into the form of a drama by different persons ; and that it made no difference that he had himself dramatised it ; but that a writer could not produce and represent a drama which he had borrowed from a drama written previously by another person. *Held* (by Mr. Justice Kekewich), on the authority of *Toole v. Young*, that any person might dramatise a published novel, even though the author of the novel had dramatised his own work ; and that the defendant was, under the circumstances, entitled to judgment with costs ; and also to an inquiry as to what damages he had incurred by reason of the interim injunction.—*Schlesinger v. Bedford*, High Ct., Ch. Div., 11 December.

COPYRIGHT.—*Dramatic piece—Dramatising a novel—Representation without consent of proprietor*—3 & 4 Will. c. 15, secs. 1, 2-5, and 6 Vict. c. 45, sec. 24.—An action was brought by the trustees and executors of the will of A. to restrain the defendant from performing a play called "The New Magdalen," the copyright in which the plaintiffs claimed to be their own property. A. had dramatised a version of his novel called "The New Magdalen," and in November 1889 the defendant had, in consideration of a payment of one guinea, obtained a licence to perform a dramatic version of the same novel for two nights from R. and others, who had played it for some years during A.'s lifetime. The play as so performed by R. and others had, it was said, been adapted directly from the novel by W. S., but during the present trial of the action it turned out that A.'s play was published before the novel, though W. S. stated in evidence that he had never seen that play, and that he had taken his version entirely from a copy of the novel he had bought at a bookstall. The defendant did not, in fact, perform the piece the two nights for which he was licensed, in consequence of his having been served by the plaintiffs with a notice of motion for an interim injunction, upon which he gave an undertaking not to perform it ; but, as a question of law was raised, the motion was ordered to stand over till the trial. Before the trial the defendant had offered to pay some, though not the whole, of the costs of the action, but this offer the plaintiffs declined. The plaintiffs relied on the decision in *Reade v. Conquest* (11 C. B. N. S. 479), that where an author first composed a drama and then a novel from that drama, he could restrain an infringement of his right of representation, on the ground that in using the novel for the purpose of dramatising it the defendant was to be treated as copying direct from the drama. The plaintiffs waived any claim as to damages. *Held* (by Mr. Justice Kekewich), that the case was governed by *Reade v. Conquest*, and that, although the defendant was innocent in his intention, he was in fact intending to represent on the stage a drama substantially the same as the plaintiffs' drama, which was written before the novel ; and that therefore the plaintiffs were entitled to a perpetual injunction as claimed, with costs.—*Schlesinger v. Turner*, High Ct., Ch. Div., 12 December.

COMPANY.—*Winding-up—Scotch Company—Claim of landlord after winding-up—Sequestration—Companies Act, 1862, secs. 87, 163.*—This was a motion by the liquidator of the W. company in liquidation, to restrain the landlord of certain premises let to the company prior to the winding-up, from proceeding with the sequestration under the following circumstances. The company, a Scotch company, prior to the winding-up, which took place in August 1890, became the tenants of certain premises in Glasgow. Shortly after the winding-up the landlord's agent was informed that the liquidator of the company intended to remove stock and other goods from the premises. Thereupon the landlord took proceedings in the Sheriff Court of Lanarkshire and obtained an order for sequestration, under which the goods were impounded to meet by a sale of a sufficient part of them (if not paid before) the two half-yearly instalments of rent, to become due on Martinmas last and Whitsunday next. No leave was obtained by the landlord under sec. 87 of the Companies Act, 1862, to take these proceedings. The questions argued were: (1) Whether a Scotch sequestration was a proceeding within the terms of sec. 163 of the Companies Act, 1862; (2) if it was, then whether, under sec. 87 of the same Act, the Court could give leave to the landlord to pursue his remedy by sequestration. On behalf of the liquidator it was argued that a Scotch sequestration was within the terms of sec. 163, and that, by analogy to the right of a landlord to distrain in respect of rent, the landlord would not be allowed to obtain preference for rent in respect of occupation before the winding-up. On behalf of the landlord it was argued that the sequestration aimed at by sec. 163 was an English sequestration only, a proceeding entirely different from a Scotch sequestration. It was further contended that, if a Scotch sequestration was a proceeding hit by sec. 163, still, inasmuch as the landlord's right was in the nature of a mortgage, the Court would under sec. 87 give him leave, as a matter of course, to enforce his charge. *Held* that the word "sequestration" in sec. 163 was inapplicable to a Scotch sequestration. *Held* (by Mr. Justice North) also, that sec. 163 ought to be read in conjunction with sec. 87, and that the Court could give leave to proceed with the sequestration. Leave was accordingly given, but upon the terms of the landlord paying the costs of the application, he having been in the wrong throughout the proceedings.—*Wanzer, Limited*, High Ct., Ch. Div. 13 December.

WILL.—*Charitable bequest—Cy-près—Lapse.*—A testator, after giving specific legacies to various persons, the gift of which was prefaced by the words, "I bequeath the pecuniary legacies following," continued, "I bequeath the following charitable legacies." He then proceeded to give a number of legacies to various Roman Catholic institutions, churches, and bodies, and amongst them he gave as follows: "To the Orphanage of St. D., N., £200." The Orphanage of St. D., N., was a voluntary institution maintained

by Mrs. P. at her own expense, and was in existence at the date of the testator's death, but was shortly afterwards discontinued, before the distribution of the testator's assets. On a summons taken out by the residuary legatees for a declaration that the legacy had lapsed, and formed part of the residuary estate: *Held* (by Mr. Justice Stirling), that, if the charitable institution had been regularly organised and endowed with funds devoted to charitable purposes, and was dissolved before payment of the legacy, the legacy would have been applicable *cy-près* to the same purposes as any surplus funds of the institution remaining unemployed at the time of the dissolution; that the institution in the present case not being so organised or endowed, but being a mere private charity, the legacy could not be applied *cy-près*; further, that the words with which the gift to the charities was prefaced did not amount to a dedication to general charitable purposes of the amounts of the legacies so bequeathed, but were used merely as a convenient mode of grouping together the various institutions which the testator meant to benefit; and, therefore, that the legacy lapsed and fell into residue.—*Slevin v. Hepburn*, High Ct., Ch. Div., 13 December.

SHIP.—*Damage—Obstruction*.—By a charter party it was agreed that the respondents' ship should load a cargo of iron ore, and proceed to N. and deliver the cargo as directed by the consignees. The bill of lading was indorsed to the appellants, who were proprietors of a wharf at N. The ship proceeded to N., and was ordered by the appellants to discharge at their wharf. There were two berths at the wharf, one alongside the wharf, and the other outside the first berth. A ridge of mud had accumulated between the two, and the respondents' ship struck upon it while approaching the wharf, and sustained damage. *Held*, that the appellants, the wharf owners, were not liable. Judgment of the Court of Appeal (14 P. Div. 138) reversed.—*The Calliope*, House of Lords, 15 December.

BANK.—*Deposit of securities of customer—Purchaser for value—Notice—Duty to inquire*.—A firm of stockbrokers had certain securities of the plaintiffs in their possession for safe custody. The securities included certain bonds known as "Cedulas," some Rio Tinto shares, and other securities payable to bearer and passing by delivery on the Stock Exchange. One of the firm sold the "Cedulas" and Rio Tinto shares, and at the same time contracted for a repurchase of similar securities for the same amount for the next settling day, namely, the 28th October 1887. The substituted securities, with other securities belonging to the plaintiffs, were, without authority from the plaintiffs, handed over to the defendant bank, whose customers the brokers were, to secure a loan made to the brokers by the bank. The brokers subsequently, on the 14th June 1888, were declared defaulters on the Stock Exchange, and the plaintiffs sued the bank for the value of the securities which had been sold by them to recoup themselves for their advances, and for delivery

of such securities as had not been sold, with damages for depreciation in value of such of them as had depreciated since the day when they were demanded by the plaintiff to whom they belonged. *Held* (by Lords Justices Lindley, Bowen, and Fry, affirming the decision of Mr. Justice Kekewich), that the case was governed by *Earl of Sheffield v. London Joint Stock Bank* (13 App. Cas. 333); that the "Cedulas" and Rio Tinto shares had been appropriated to and were the property of the plaintiffs; that, although the defendants honestly believed that the brokers were entitled to pledge the securities, they did not believe that they had authority from the real owners to pledge them; that the defendants did not, therefore, become *bona fide* holders for value without notice; and that the plaintiffs were entitled to recover the securities or their value as against the defendants.—*Simmons v. London Joint Stock Bank*, Ct. of App., 16 December.

SHIP.—*Collision—Limitation of liability.*—The Merchant Shipping Act, 1862, by sec. 54, provides that—"The owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity (that is to say): (1) Where any loss of life or personal injury is caused to any person being carried in such ship; (2) Where any damage or loss is caused to any goods, merchandise, or any things whatsoever on board any such ship; (3) Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat; (4) Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages . . . to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships and in the case of steamships the gross tonnage without deduction on account of engine room." By the Merchant Shipping Act, 1867, sec. 9, "The following rules shall be observed with respect to accommodation on board British ships (that is to say): (1) Every place in any ship occupied by seamen or apprentices and appropriated to their use shall have for every such seaman or apprentice a space of not less than seventy-two cubic feet, and of not less than twelve superficial feet measured on deck or floor of such place. (3) No such place as aforesaid shall be deemed to be such as to authorise a deduction from registered tonnage under the provisions hereinafter contained, unless there is, or are, in the ship one or more properly constructed privy or privies for the use of the crew." By sec. 3 of the Merchant Shipping (Tonnage) Act, 1889, which is entitled "an Act to amend the law relating to the measurement of the tonnage of merchant ships," it is provided, "In measuring or re-measuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage: (i.) Any

space used exclusively for the accommodation of the master ; (ii.) Any space used exclusively for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals, and other instruments of navigation and boatswain's stores ; and (iii.) The space occupied by the donkey-engine and boiler if connected with the main pumps of the ship." A plaintiff in a limitation suit, whose ship had been measured under the Merchant Shipping (Tonnage) Act, 1889, sought to deduct from his ship's tonnage the deductions mentioned in sec. 3 of that Act. *Held* (by Sir James Hannen), that, for the purposes of a limitation suit, a plaintiff was not entitled to such deductions.—*The Umbilo*, High Ct., Adm. Div., 16 December.

ARBITRATION.—*Setting aside award—Bribing of arbitrator.*—This was a motion to set aside an award on the ground that the arbitrator had accepted a bribe from one of the parties to the submission. The arbitrator was not called as a witness by the plaintiff, but other persons deposed to a conversation in which the arbitrator had admitted that he had received a bribe. The defendant, who was the other party to the arbitration, was not present when this conversation took place, and, before calling any witnesses, took the objection that the admission of the arbitrator was no evidence against him ; and that there was no other evidence of misconduct. *Held* (by Mr. Justice Kekewich), that the ordinary rule was that admissions by one person could not be used as evidence against another party unless made in his presence ; that there was no reason for saying that admissions by an arbitrator formed an exception to that rule ; that the arbitrator ought himself to have been called to prove the misconduct ; and that the admission was not sufficiently proved to show fraud on the part of the arbitrator, and that the motion as against the defendant must be refused.—*Re Whiteley v. Roberts' Arbitration*, High Ct., Ch. Div., 17 December.

PARTNERSHIP.—*Sum deposited for investment—Fraud—Liability—Statute of limitations—Trustee Act, 1888.*—The plaintiff at various dates between June 1867 and December 1874 deposited with a firm of solicitors, for investment, sums amounting in the whole to £351. The firm consisted of T. M., W. G., and J. B. W. G. died in April 1877, and his legal personal representative was one of the defendants. In 1878 an action to wind-up the partnership was commenced. A receiver was appointed in that action, and in his hands or in Court were considerable assets of the partnership. J. B. died in January 1887, and his legal personal representative was a defendant to the present action. In April 1888 T. M. was adjudicated bankrupt, and his trustee was a defendant. Down to 1886, interest at 5 per cent. on the sum of £351 was regularly paid to the plaintiff at first by the firm, and afterwards by the surviving partners. £50, part of the sum of £351, had been duly invested by the firm, but the residue had, so far as could be ascertained, never been invested. The present action was commenced for the

purpose of rendering the partnership estate, and subject thereto the separate estates of the partners, liable for the sum which they had failed to invest. The legal personal representative of W. G. alone contested the claim. The defences relied on were, first, the Statute of Limitations; and secondly, sec. 8 of the Trustee Act, 1888. It was contended on behalf of the plaintiffs that the case fell within the exceptions to sec. 8 of the Trustee Act, 1888, and that, even if it did not, a trustee was not entitled under that Act to greater protection than a person not a trustee; and that *Blair v. Bromley* (2 Ph. 354) showed that in such a case as the present, partners would be liable whether they occupied the position of trustees or not. *Held* (by Mr. Justice Stirling), that the case was within the decision in *Blair v. Bromley*; that that case depended on the law of partnership, not on the law of trusts, and was therefore unaffected by the Trustee Act, 1888. The money had got into the hands of the firm without fraud, and was misapplied by them to their own purposes. In 1876, before the death of W. G., an account was furnished to the plaintiff which contained misstatements with regard to the fund, and until the fraud was discovered the Statute of Limitations could not begin to run. The plaintiff was therefore entitled to the relief which he claimed, and it became unnecessary to consider whether the case did or did not fall within the exceptions to sec. 8 of the Trustee Act, 1888.—*Moore v. Knight*, High Ct., Ch. Div., 18 December.

COMPANY.—*Winding-up—Arrangement with creditors.*—This was a petition presented, sec. 2 of the Joint-Stock Companies Arrangement Act, 1870, by the liquidator of a company, which was being wound up under the supervision of the Court, to obtain the sanction of the Court to a scheme of arrangement between the company and its creditors. The scheme had been approved by more than the prescribed majority at meetings of the shareholders, debenture-holders, and unsecured creditors respectively of the company. Two dissentient debenture-holders now opposed the scheme on the ground that the Court had no jurisdiction under the Act to sanction a scheme affecting debenture-holders, and that the scheme was unfair to the debenture-holders. The general result of the scheme was to substitute new debentures for the old at a reduced rate of interest. *Held* (by Lord Justices Lindley, Bowen, and Fry, affirming the decision of Mr. Justice North), that there was jurisdiction under the Act to sanction a scheme affecting the rights of debenture-holders, and that the scheme was for the benefit of all parties, and ought to be sanctioned.—*Re Alabama New Orleans, Texas, and Pacific Junctions Railway Company Limited*, Court of Appeal, 18 December.

SHIP AND SHIPPING.—*Bill of lading*—"All other conditions as per charter party—*Exceptions in charter party—Lost through negligence of crew.*—The defendants were shipowners; the plaintiffs were indorsees of the bill of lading of coal shipped on board a ship of the defendants. The coals had been lost by reason of the stranding of the

ship, and this was caused by the negligence of the officers and crew in charge of her. The action was for damages in respect of the loss. The bill of lading provided that the coals were to be delivered at the port of discharge, in good order, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever excepted, unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter party." The charter party contained this exception, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage always excepted;" and there was this further exception, "negligence clause as per Baltic Bill of Lading, 1885." The negligence clause in the Baltic Bill of Lading was as follows: "Strandings and collisions, and all losses and damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." The defendants contended that this clause was, by virtue of the words "all other conditions as per charter party," incorporated with the bill of lading, and that, therefore, the defendants were not liable for the loss. Mr. Baron Huddleston held that the Baltic negligence clause was not incorporated with the bill of lading, and consequently that the defendants were liable. The defendants appealed. *Held* (by Lord Esher and Lords Justices Lopes and Kay), that the words "all other conditions as per charter party," standing where they did in the bill of lading, referred only to conditions to be performed by the consignee, and consequently did not introduce the exceptions in the charter party, which were limitations of the liability of the shipowner.—*Terraino v. Campbell*, Ct. of App., 19 December.

CONFLICT OF LAWS.—"*Mobilia sequuntur personam*"—*Mortgage by Queensland Company of calls on shares—Arrestment in Scotland of calls due from Scottish shareholders—Priority*.—The Q. Company was a company incorporated and carrying on business in Queensland. In September 1886 the Q. Company issued and deposited with the U. Bank, as security for moneys due and to become due, two debentures, the one for £10,000 and the other for £50,000; both debentures assigned the uncalled capital of the company, and were, as the Court held, valid according to the law of Queensland. In December 1886 the Q. Company made a call of £50 a share, payable in four instalments, in February, April, June, and August 1887. The company had many shareholders domiciled in Scotland, and some in England. On the 20th October 1887 an order was made for winding-up the company in Queensland, and on the 14th June 1888 a similar order was made in England. On the 24th February 1887 the A. Company (a company domiciled in Scotland) commenced proceedings in Scotland to recover from the Q. Company large sums entrusted to them for investment. Immediately after the institution of the action, the call moneys due under the call

made by the Q. Company as above, from shareholders resident in Scotland, were arrested by the Scotch process called arrestment on the dependence of the action. Proceedings in this action were restrained by the High Court in England on the 24th February 1888, on the motion of the English liquidator of the Q. Company, but the order was expressly made without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders in the Q. Company, which the A. Company had acquired by their said proceedings, and the amounts received from the Scotch shareholders were directed to be carried by the liquidator to a separate account. On the 6th September 1889 an order was made in the Queensland winding-up allowing the claim of the A. Company for £12,662, 4s. 5d. The U. Bank, whose claim against the Q. Company had been allowed for £74,000, but who had valued their security at £31,000, took out this summons claiming that the liquidator should pay over to the bank all the moneys in his hands, representing proceeds of the said call. The A. Company claimed to be paid in priority out of the part of the money received from Scotch shareholders. The evidence stated that, according to the law of Scotland, the arrestment had the effect of attaching the fund in favour of the creditor obtaining it, and upon the decree being pronounced in the suit the security would become complete, and that such an arrestment operated as an assignment of the fund duly intimated; that an admission of the sum due in the winding-up of a company was for this purpose equivalent to a decree; and that, according to the law of Scotland, in order to create a competent security over incorporeal personal property, the assignation thereof must be duly intimated to the debtor. *Held* (by Mr. Justice North), that the Scotch attachment gave the A. Company priority over the debentures held by the U. Bank; that without deciding the point whether the maxim *Mobilia sequuntur personam* made the assignment of the call by the Q. Company domiciled in Queensland valid in Scotland, the case was governed by the principle that, if a transfer of personal property is carried out validly according to the law of the country where the property is situated, it cannot be made invalid by anything in the law of the assignor's domicile; and that, as the evidence proved that the arrestment operated as an assignment by the Q. Company, completed by intimation according to the law of Scotland, that assignment could not be made invalid by the prior assignment, which could only have effect by the law of the Q. Company's domicile.—*Re Queensland Mercantile Agency Company Limited*, High Ct., Ch. Div., 14 January.

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Editorial.

Unsuccessful Intimidation.—In the case of *Agnew v. Munro*, on 2nd February, the Justiciary Appeal Court had to interpret the already very plain and intelligible terms of the seventh section of the Conspiracy and Protection of Property Act, 1875. Before the Sheriff-Substitute at Dundee, a complaint was brought by the Procurator-Fiscal against Munro, secretary to the local branch of the Dock, Wharf, Riverside, and General Labourers' Union, charging him with a contravention of the said section, in so far as, on 17th November last, with a view to compel four persons who were then engaged discharging the steamer *Moravia* to abstain from that work, he wrongfully and without legal authority intimidated them by threatening them—one by saying that he would "wear sore bones for it one of these nights;" another, that he would "be made to do so;" another, that he would "get men to throw them into the dock;" and another, that he would "wear sore bones"—the accused by these threats meaning that personal violence would be used to the four men. At the calling of the case, after hearing objections, the Sheriff-Substitute offered to the complainer the opportunity of amending the complaint, by adding the statement that "in consequence of the threats, the persons were intimidated, and abstained from doing work that they had a legal right to do." This the complainer declined to do, and the

Sheriff dismissed the complaint as irrelevant. The Procurator-Fiscal appealed to the High Court, and their lordships (the Lord Justice-Clerk, and Lords M'Laren, Trayner, and Wellwood) unanimously sustained the appeal, remitting back to the Sheriff to proceed with the case. The act of a person accused under the statute does not depend for its criminality upon its success. Lord M'Laren forcibly exposed the untenability of the Sheriff-Substitute's position, when he remarked that he could "hardly imagine that the Legislature could have passed a clause that would give protection only to the coward who acted in accordance with the wishes of the person who intimidated him, and would, at the same time, refuse protection to the honest and capable man who had the courage to resist the intimidation, while, at the same time, feeling a reasonable apprehension that the threats might be acted on." The Sheriff seems to have been mixing up the doctrine of reduction of a contract on the ground of force and fear with the provisions of the statute. But, in the case of intimidators, it is to be *Vae Victis!* as well as *Vae Victoribus!*



An Effective Reference to Oath.—Quite a unique piece of procedure was brought to light in the course of an appeal to the High Court of Justiciary on 26th January. In the Sheriff Small Debt Court at Edinburgh, one Mulholland, of Innerleithen, sued one Alexina Gordon, of Edinburgh, for payment of £10. This sum pursuer alleged he had given to defender when she had been engaged to be married to him, but the engagement had been broken off. This looked like a vexatious business to bring into Court, and one likely to cause trouble. But the wisdom of our ancestors devised a procedure known as a Reference to Oath, and it has been bequeathed to us to use when we have the opportunity. Sheriff-Substitute Hamilton, being abreast of all the improvements in his own line of business, had heard of this sumptuous method of getting at the truth. Therefore his lordship promptly referred the matter to the *pursuer's* oath! In order to keep all regular, the Sheriff-Substitute also refused to allow *defender* to lead any evidence in support of her case.

He found that the £10 had only been lent to defender, and decerned in favour of pursuer for the amount. Defender's appeal was sustained by the High Court; and the case was remitted back to the Sheriff to proceed in terms of law.

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The Case of Walter Hargan.—The House of Commons is not the best form for a Criminal Court of Appeal, if one is to be established in the realm. In a higher degree than any tribunal with which we are acquainted (and that is to say much), that House is marred by a tendency to aim solely at splitting the ears of the groundlings. We refer, of course, to a section of its members only. It was with no such aim, however, that Mr. Lowther brought up in the Lower House on 5th February, "as a definite matter of urgent public importance," the sentence and reduced sentence upon Walter Hargan. We think the right honourable gentleman did well to have the case discussed, and to afford the Home Secretary the opportunity of setting out the reasons which led him to go so far, and no further, in reducing the sentence. Hargan's case is undoubtedly a very hard one. After serving in the army with great distinction, he retired from the Royal West Surrey regiment with the rank of Acting Sergeant-Major. He was a man of excellent character; trustworthy, peaceable, and well conducted. On leaving the army he spent some time in South America, and then returned to this country. Five days after his arrival, he was in a public-house, and found himself called upon to intervene on behalf of the landlady, who was threatened with personal violence by some persons who were drinking in her house. The disorder was quelled, Hargan producing, but not using, a revolver. Admittedly Hargan had no part in the dispute, but merely came to the landlady's succour. Thereby he incurred the hostility of the ruffians. In order to avoid further disturbance, he quitted the premises by a back window; but, to reach his lodgings, it was necessary for him to pass the door of the public-house. Three of the disputants observed him, and followed him, "uttering imprecations and otherwise assuming a hostile attitude." These men knew that he had a revolver, and Hargan concluded that, as they showed a wish to grapple

with him, they must meantime have provided themselves with weapons. Accordingly, when they came within five or ten yards of him, he presented his revolver; and, as they still came on, he fired and killed two of them. At the trial, Mr. Justice Charles directed the jury to return a verdict of murder. They returned a verdict of manslaughter; whereupon his lordship passed the astounding sentence of twenty years' penal servitude! This had been reduced by the Home Secretary to one of twelve months' imprisonment, and this, in turn, Mr. Lowther wished to have reviewed. The Home Secretary declined to interfere further. He admitted that Hargan fired because he believed himself about to be attacked, and that there certainly was a reasonable probability that he would be assaulted—which considerations took from his act that character of malice which alone could justify the severer sentence. But, on the other hand, for taking the lives of these two men "without any of that immediate, manifest, and inevitable peril which the law of England required to be shown," a substantial punishment was due to his act. It seems a little hard to reconcile the qualifying consideration with the proposition which it qualifies. If, in the circumstances, there was "a reasonable probability that he would be assaulted" sufficient to negative malice, and if Hargan believed that he would be assaulted, it is, we humbly think, demanding rather much of human fortitude and patience to expect him to wait until that "reasonable probability" has passed some vague boundary line and become "immediate, manifest, and inevitable peril." We fear that Hargan has to some extent been utilised as a warning against the hasty use of firearms.



Lands Valuation Appeal Court.—We understand that it is intended to increase the number of judges in the Valuation Appeal Court, and to provide that three of their lordships shall in future sit instead of two as at present. This will constitute a Court in many respects more satisfactory. Probably a Bill, dealing with the subject by itself, will be introduced into Parliament; but the provision may be included in a more comprehensive measure, dealing with other points of Court of Session arrangement.

Counsel's Identity.— Sometimes amusing incongruities arise from the closeness with which a counsel in the course of pleading identifies himself with his client. It is a convenient form of speech to refer to yourself as your client. Even judges do not scorn to avail themselves of it in addressing the Bar. "Mr. X," his lordship will say, "are you the engine-driver?" "Are you the lady who was expelled from the public-house for being riotous and disorderly, Mr. Q.?" will be asked by the Bench of a peculiarly staid and respectable counsel. And such questions are not resented, the strict distinction seldom being drawn. It takes a little time for an Advocate to merge his own identity in that of his client in this way. During a long multiplepointing, in which the claimants were legion, Lord Fraser suddenly turned to O., one of the counsel, and asked brusquely, "Who are you?" The gentleman was sadly taken aback at the directness of the question. He flushed a little, and stammered, "I'm Mr. O., my lord." But this counsel has, through a large practice, learned the ways of the Courts since those days. He took part in the following colloquy before one of the Divisions of the Court of Session last month. He and Z. were opposing counsel in a case. "Who are you, Mr. O.?" asked the presiding judge. "I'm Mr. Z.'s sister, my lord," was the unblushing statement. "And why are you interested in pressing this?" "I am anxious to get married, my lord," said O., who has really lost all sense of shame and modesty. To the question of an Outer House judge, too, this gentleman with many *aliases* not long since made the startling disclosure, "My lord, I am Charles Macready's bastard son!"



Ladies in Court.—The details of the evidence led in the case known as the Kirriemuir Murder Trial last month were not savoury. It is specially painful, therefore, to be obliged to remark on the presence of a goodly number of ladies during the proceedings. We cannot see justification for their presence in any Criminal Court when they are not concerned in the business there; and it is satisfactory to be able to say that, as a general rule, ladies in Scotland do not flock to feast on the horrors of a notorious case as their sisters are accused

of doing in Paris and, in a lesser degree, in London. But the exceptionally objectionable case in question was an exception to the rule in this respect.

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Whitechapel again.—An atrocious murder was perpetrated in East London on the night of the 12th February, and a horror-loving public at once classified it as "another Whitechapel Tragedy;" and at once began to abuse the police, and to wag its head with preternatural sagacity. Yet the public has possibly been somewhat hasty in both particulars. But meanwhile what has become of Dr. Forbes Winslow? Has he decided *not* to catch the perpetrator (or perpetrators, as we think) of the other nine?

Special Articles.

LEGAL PATRONAGE AND POLITICAL PREFERMENT.

RECENT appointments of judges in England have furnished to the needy London journalists occasion for much scribbling about the virtue of promoting lawyers without regard to political services. Why the elevation to the Bench of Mr. Justice Romer or of Mr. Justice Jeune, in particular, should have provided such a text, it is not easy for the merely provincial mind to discern. The connection between text and homily is as loose as we are used to find it of a Sunday morning. Formerly a Gladstonian, Mr. Romer had become a convert to Unionism, and he was made a judge by the Liberal Chancellor of a Unionist Government. There is nothing unusual here. Mr. Justice Jeune had a more active political record, though not a more strikingly fortunate one. At the General Election of 1880 he was Conservative candidate for Colchester, and he sustained a crushing defeat. Since then it is true, he has not, so far as we know, taken any part in politics. But the appointment of a defeated Conservative

candidate by a Conservative Lord Chancellor would not naturally have presented itself to us in the light of a peculiarly tempting occasion for descanting on the merit of ignoring party services in these matters. Both these distinguished men are lawyers of ability and skill, and of the highest professional standing. No appointments to the vacancies could have been more satisfactory or more generally approved on all sides; and the fact that their party allegiance and party services called the Lord Chancellor's attention to their fitness for their present high offices, is a matter for satisfaction. In the case of Mr. Justice Wright, on the other hand, it may more fairly be said that political considerations were absent. But it is *apropos* of Mr. Justice Romer's creation, along with Mr. Justice Wright's, that the *Spectator* strays into the conclusion that the day for appointing to judgeships as a reward for purely political services is past; and that in making these present appointments, Lord Halsbury has set an example of selecting men of intellectual eminence which cannot be departed from. We question, then, the appropriateness of our contemporary's comment; and we more than question whether there be ground for its sanguine assertion.

In so far as these recurring attacks on the dispensing of legal patronage are protests against promoting to high office incapable and unqualified men solely on account of their party services, no disinterested person will fail to endorse them. Such an abuse of patronage has no countervailing advantages of a public kind. It can only mean a private and selfish gain at the price of public loss and injury. Appointments of the kind were formerly rife, and in recent times they have not been rare. Almost without exception they have been productive of injustice, and have brought discredit on the judicial office. In the condemnation of all such, then, we heartily join.

There is, however, a tendency to press the proposition much further, and altogether too far. The true burden of the ordinary criticism in this connection is that party services not only afford no claim for legal promotion, but are a positive disqualification. The criticisms really amount to this. Unconsciously to the critics it may be, but quite

unambiguously, this is the bearing of the condemnation of many appointments. In so exaggerated a shape are the claims of a lawyer who has never actively mixed in politics, but who has confined himself rigorously and exclusively to the practice of his profession, put forward by his backers in the case of a tempting vacancy, that an indiscriminating public has come to fancy that there must be something specially meritorious in such a restriction; and, conversely and inconsequently, that to have taken part in political work must be a fatal disqualification for legal promotion. In short, compared with the lawyer who has eschewed politics—or who has been eschewed by politics, for there are two ways of it—he who has found it possible to follow out a political career along with the active pursuit of the legal profession, is seriously handicapped. *Ceteris paribus* in regard to mental endowment and attainment in legal knowledge, the former ought to be taken and the latter ought to be left. When stated thus baldly, the proposition would, of course, be acknowledged by few. Yet if one has read and heard the contentions in individual cases, he cannot fail to see that there exists this fallacious tendency to magnify into a positive merit the holding aloof from all political work (without giving heed to the motive or the necessity therefor), and simultaneously to degrade into positive disability any participation in party warfare. There is a prejudice against so-called political lawyers.

Such a doctrine is absurd on the face of it. It is against it that we write. Other qualifications being practically equal, there is no good argument why the present dispensers of patronage, who as such are politicians and party men, should not give effect to their natural desire to reward those who have rendered valuable party services. Assuredly, such a principle of filling up appointments is not peculiar to the department of the law. It is general. Throughout every branch of the public service it is the practice to exercise patronage according to this plain and intelligible rule. We are not defending it from the standpoint of ideal excellence, or altogether in the abstract. But it has the sanctions of long-established usage, of present very general custom, and of having worked, on the whole, with substantial success.

The loftiest form in which the aim of any dispenser of patronage can be stated, is to secure for the vacant post the best man who is available. Our position is that, with comparatively insignificant exceptions, this is now done. In the first place, the ablest lawyers generally do seek to enter Parliament, or turn to other political work. For obvious reasons, this is much more true of England than of Scotland, in so far as a *parliamentary* career is concerned ; but it is much more true of Scotland than of England, in so far as other party work is concerned. Not so many advocates as barristers are to be found in the House of Commons—not so many, that is, in proportion to the numbers of their respective bodies. But party work of a less ambitious kind is more universal among the members of the Scottish Bar than it is amongst those of either the English or the Irish Bar ; and throughout the other branch of the legal profession also it is probably rather more general than in the sister countries. But, as matter of fact, with but few exceptions, the best lawyers take part in politics, and ultimately seek to enter the House of Commons. It would be impossible at present to select for any vacancy any Scottish lawyer of ability who had not some political record, and who had not shown unmistakeably to which party in the State he owed allegiance.

Further, it may not unfairly be said that in the higher walks of politics, at least, there is a valuable training for judicial office. A lawyer, or any other man, is none the better for being narrow. A lawyer more than most other men is all the better for having a wide range of experience and broad views of things. Scarcely any branch of knowledge can come amiss to him. And if this be true of a counsel, it is still more true of a judge. Dickens in one of his works speaks of a barrister who had shut himself up in his chambers, spending night after night in study, “striving to reduce a great intellect to the level of a narrow subject.” Such a description is no longer a good one of what a lawyer *ought* to do to fit himself for his profession. The law itself is now less narrow and less arbitrary, and they who deal with it and make it must bring to its treatment less restricted views. To the ordinary mind it will seem an advantage that those who are charged with the duty of interpreting the laws should have had some

experience in passing them ; and that a career in the Legislature of the country is a profitable element of training for the Bench. The London *Law Times*, which is less sanguine, perhaps because more interested, than the *Spectator*, puts it bluntly thus : " Every Government wants a certain number of lawyers in the House ; lawyers, we fear, will not go into the House without a prospect of substantial reward ; the only real substantial reward is a judgeship." The prospect of such a substantial reward does, we affirm, as a general rule, induce the best lawyers to seek to enter Parliament. To almost all rules there are exceptions, but the present practice of dispensing legal patronage works well.

CRUELTY FOR COMMERCIAL PURPOSES.

It can scarcely be affirmed that the human race in the earlier stages of its development has any regard whatever for the sufferings of the lower animals. But it would be equally misleading to say that even in our own advanced social system a regard for their sufferings is universal, or even very widely spread. Very far from it. These are, fortunately, the days of the Society for the Prevention of Cruelty to Animals ; but they are also the days when such a Society has its hands very full, and requires to be vigilant. Left to themselves many of our enlightened electors, to whom, in virtue of their attribute of manhood, is entrusted the control of animals, show how little, if anything, they have risen above the callousness of the savage. " The hand of least employment hath still the daintier sense ;" and yet it seems to us that it is the daintier sense that is undoubtedly the standard to be aimed at, and that the acquired insensibility to suffering in man or beast is the standard which ought to be checked and prohibited. There are, of course, very different degrees and kinds of barbarity covered by the well-known phrase, " Cruelty to animals." Such acts differ not only in the amount of suffering inflicted, but also in the motive which prompted them. Mere wanton cruelty—cruelty inflicted solely for the purpose of causing pain—is not, we may safely assert, on the

increase. Miscreants of the kind who put cats on the fire for their amusement, or who use them for torches—as the Emperor Nero did the early Christians—are either become somewhat scarcer in the community, or have had their sporting tendencies restrained in a wholesome way by the dread of a ten shillings fine. Nor is there an increase in the number of those who inflict pain upon rabbits, pigeons, and dogs for the purposes of alleged scientific research—though your imaginative and harmless medical student must still have licence to boast of the callousness he longs to attain to. On the other hand, we believe that it is otherwise where commercial interests are concerned; and that in the treatment of animals which are used by man for the sake of gain there is no improvement, but rather a change for the worse. True, there may not be now so many cases of overdriven horses, although a case on which we recently commented shows that even Tramway Companies have such “mishaps” to their stock. There may even be now-a-days fewer cases of causing animals to work while suffering from sores or lameness, for the very reason that the prosecutions therefor are more numerous. But there are other respects in which men are not more humane than they were in the good old days of whipping pigs to death, because that mode of despatch made their flesh more tender to the eater. To one of these respects we now refer—the cruelties “incident to” the transit of cattle and sheep. The attention of the public ought to be called to this matter. Take, for example, the facts disclosed by a prosecution at Dursley, in Gloucestershire, towards the end of January last. Thirty sheep were conveyed to Gloucester market along the Midland Railway Company’s line, and the charge was brought against the shepherd for the incidental consequences of the trip. The whole thirty wretched animals were crowded into a single truck. There was “great difficulty” in getting them jammed in. The result was that when they reached the end of their journey, three of the sheep were unable to stand, and two had been so injured by being trampled upon that they had to be immediately slaughtered. The Inspector of the Society for the Prevention of Cruelty to Animals stated that the truck was large enough for only twenty-five sheep—five-sixths of

the number stuffed into it. Nevertheless it was proved that the vehicle was of the dimensions usually provided by the Midland Railway Company for the accommodation of thirty sheep, and it would seem that this was held to be conclusive to the minds of all reasonable men. The shepherd was acquitted of the charge. One drover, who gave evidence at the trial of the cause, stated that "hundreds of sheep were lost in this way every year." Now this is not cruelty of the wanton kind. That would not be respectable. It is cruelty of the sordid, economical, money-grubbing kind. In so far, however, as the mental state of the perpetrator is concerned, there is not perhaps just very much to come and go upon in a question of relative refinement.

The transit of live stock by land, however, does not entail on the animals a tithe of the suffering which results from transit by sea. Recent articles and statistics on the subject of the Transatlantic trade in cattle show how terrible that suffering is, even where fortunately their passage is smooth and how large is the consequent loss of life. In the case of a storm, the hardships endured by the animals are, of course enormously increased. There has recently been a good deal of discussion on the subject in the journals devoted to the stock rearing and agricultural interests; and we may almost hope that the outcome of it will be some improvement in so far as the transit of fat cattle is concerned. Had an amelioration in the lot of the animal been antagonistic to the pocket of the dealer, to entertain even this faint hope would have been foolish in the extreme. Fortunately, however, it has been shown that this is not so, as regards exporters at least. Mr. Plimsoll, in a long letter on the subject of the Atlantic cattle trade, written to the *Times* of 5th January, quotes the most extensive exporters of cattle from the United States to this country as witnesses in favour of his proposal to stop the live cattle traffic, and to rely entirely upon the trade in dressed carcasses. These gentlemen declare that there is no difference in remunerativeness, in so far as exporters are concerned, whether live cattle or carcasses are exported,—sometimes the one thing pays best, sometimes the other,—while consumers are most benefited by the carcase trade. One of these exporters, quoted by Mr. Plimsoll, said: "If your people wan

cattle, we will send cattle; if they want beef, we will send beef. Only it is a cruel business, and a fool's business, this live fat cattle trade across the Atlantic, and it ought to be stopped." One side of the ocean is, therefore, in a fair way to become humane. Pockets there are not concerned, and hearts may be merciful. How the change would affect importers is less certain, though there appear to be considerations which show that the importing of dead carcasses would be no less profitable than that of the living animal. On the whole, therefore, there exists some hope that the miseries of a passage across the Atlantic will in future be spared these wretched animals. But let us not mislead. Do not let it be inferred that the principle of cruelty for commercial purposes will be thereby infringed. If the traffic should happily cease, they who abandon it must not be supposed to be false to that principle. They shall have required, we may rest assured, to be first plainly shown that the determining consideration of profit does not arise. For lean cattle, on the other hand, there is no such hope, unless, indeed, a humane legislature sees fit to overturn the great guiding principle of to-day—to wit, the justifiability of cruelty for commercial purposes—and to insist that the horrors of the Atlantic cattle trade shall cease.

TRANSMISSION OF PERSONAL OBLIGATION.

THE Conveyancing Act of 1874 introduced many beneficial changes, and not the least among them are the benefits conferred upon a creditor in an heritable security, and also to some extent upon a purchaser and seller, by the 47th section of that Act.

Two radical changes are effected by this section of the Act. The one is that an agreement may be inserted *in græmio* of the conveyance of an estate, to the effect that the personal obligation contained in any security writ affecting that estate shall transmit against the disponent; and the other is that the personal obligation may be enforced against such disponent, or against a successor, donee, or legatee of the original or any

subsequent debtor, by summary diligence, without the necessity of obtaining a bond of corroboration. It is with the first mentioned of these changes that we wish mainly to deal; but before doing so, it may be of some assistance to us to glance briefly at the state of matters which existed prior to the Act of 1874.

At that time, if it was part of an arrangement for the sale of an estate that an existing heritable security should remain a burden upon the property, the transaction might be carried out in one of two ways. If it was not intended that the purchaser should become personally liable to the creditor for the amount of the security, the lands were conveyed to him under burden of the security, and he granted an obligation of relief therefrom in favour of the seller, if this was part of the agreement between the parties. If it was intended that the purchaser should become liable, he granted a bond of corroboration in favour of the creditor, and the new debtor then became subject to summary diligence. The disposition declared the debt to be a real burden upon the property, and the creditor might then discharge his original debtor without prejudice to his real security. If the purchaser granted neither an obligation of relief nor a bond of corroboration, he was personally liable for the debt in no way whatever.

As regards a purchaser and a seller, the benefits conferred by the section of the Act which we propose to consider are not so manifest as one is inclined at first sight to suppose them to be, and, as we shall see by and by, the disadvantages, or rather the abuses, which have arisen in the exercise of the faculty provided may considerably detract from the value of the benefits given. No doubt a simplification has been introduced in the superseding of the cumbrous form of a separate bond of corroboration; but the new debtor is not thereby wholly saved from the expense of such a deed, as the agent of the creditor is still entitled to the same fee as for a bond of corroboration, and about all that the debtor is saved is the stamp only, which would have been payable on the new bond. Besides, if the original debtor is to be free, the same necessity still exists for a separate discharge in his favour, or at least for the consent of the creditor being taken to the conveyance to the effect of discharging such debtor. In the case of a

person taking by succession gift or bequest, the advantages are more apparent. Here, instead of having recourse as formerly to an ordinary action, which was necessary when the creditor did not hold a bond of corroboration, summary of diligence may be done at once, the effect of taking up the property being sufficient to fix liability on the person so taking. It must be kept in mind, however, that since the passing of the Conveyancing Act, an heir is not liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds.

The Act provides a form for applying either in the Bill Chamber or in the Sheriff Court for a warrant to charge, and when a fiat has been obtained, diligence may be executed in ordinary form.

We shall now consider the form which the agreement for transmission should take in order to be binding on the disponent, and, as a natural consequence of the enactment, to be a sufficient warrant for summary diligence against him. We shall, perhaps, arrive at an understanding of what is necessary by considering what has been held not to be an effectual agreement.

The first case which we shall consider is that of *John Carrick and others v. Rodger and others* (3rd December 1881, 9 R. 242). In that case, a builder, in consideration of a sum of money paid to him by the partners of a firm of solicitors, and of the latter freeing and relieving him, as by acceptance of the conveyance they bound themselves to free and relieve him of payment of the sums of money contained in certain bonds and dispositions in security granted by him over the subjects of conveyance, "said sums amounting *in cumulo* to £ , being the agreed-on price of said subjects," sold and disposed the subjects to them. The granter of the disposition became bankrupt, and the creditors in two of the bonds sued the disponents for payment thereof, on the ground that by virtue of the section of the Act under consideration, and of the terms of the conveyance in their favour, the obligation had transmitted against them. The Lord Ordinary held that the undertaking to free and relieve the seller amounted to an agreement in terms of the Act, the object being that the disponents were to come in his room. On appeal, the Second

Division, by a majority of two to one, reversed the Lord Ordinary's decision. Lord Young, in the course of his opinion, stated that the Act did not alter the common law rule "that an obligation to a debtor to relieve him from payment of his debt does not found a direct action (against the obligant) to the creditor in the debt." The decision is an important one, and not so much, we think, from the purchaser's point of view as from the creditor's; for the purchaser will still have to pay the amount of the bond to the seller to whom he has granted an obligation of relief, but it entails upon the creditor the necessity of seeing that there is something more than a mere obligation of relief, otherwise he may lose the benefit of a valuable personal security.

The point came up again in *Ritchie & Sturrock v. The Dullatur Feuing Company Limited* (16th December 1881, 9 R. 358). The subjects in this case had been conveyed to the company "under burden of the sum of £6800, being the amount of several heritable securities existing over the said subjects." There was no obligation of relief in favour of the disponent. The action was raised originally in the Sheriff Court of Lanarkshire, and both the Sheriff-Substitute and the Sheriff-Principal, founding upon the above clause in the deed and upon certain special circumstances surrounding the transactions of parties, held that the personal obligation had been transmitted against the company. Both interlocutors, we may, however, mention, were prior in date to the decision in *Carrick v. Rodger*. The defenders appealed to the Second Division of the Court of Session, which unanimously reversed the decision of the Court below. This case decided that facts and circumstances are not sufficient to infer liability, and that nothing short of an agreement in the sense of the Act appearing *in gramio* of the conveyance will be effectual.

Another important decision affecting the construction to be put upon the section of the Act under consideration, is that of *Stewart v. Ferguson* (10th February 1882, 9 R. 643). A person named Yuill had granted a bond and disposition in security, in ordinary form, for £9000, in favour of the Principal and Professors of the University of Glasgow. Yuill, with consent of Glass, an intermediate purchaser, disposed the property to Horne, the price being the amount of

the said bond and certain sums paid to Yuill and Glass. The disposition in favour of Horne bore that "the bond and disposition in security, and whole personal obligations therein contained, the said David Horne has become bound, as by acceptance hereof he agrees and binds himself and his heirs, executors, and successors, to pay and implement from and after the term of entry after mentioned, and so free me, the said John Clark Yuill, of the same, so that the said bond and disposition in security, together with all personal obligations to pay principal, interest, and penalties therein contained, may transmit against the said David Horne and his foresaids, in terms of the Conveyancing (Scotland) Act, 1874, as from and after the said term of entry." Yuill thereafter became bankrupt, and William Stewart, D.D., clerk to the Senatus, as representing the University of Glasgow, lodged a claim in the bankruptcy to be ranked for the full amount of the bond, which he was afterwards found entitled to do. We may here mention, incidentally, that he was allowed to rank for the full amount instead of for the balance over and above the value of the heritable security, on the ground that the bankrupt being no longer proprietor of the subjects, the claimant was not bound to deduct the value of his heritable security. The decision *quoad* this part of it rests upon a construction of the 65th section of the Bankruptcy Act of 1856. The trustee in the bankruptcy rejected the claim, but the Sheriff-Substitute, on appeal, allowed it, and the trustee then appealed to the First Division of the Court of Session, which confirmed the Sheriff-Substitute's decision. The trustee pleaded, *inter alia*, that by the section of the Conveyancing Act under consideration, the bankrupt's personal obligation to the University contained in the bond was by the disposition above referred to discharged and transmitted to Horne, and therefore Horne's estate, not Yuill's, was liable, or at least that Horne's estate must first be discussed before Yuill's could be touched. The Court was unanimously of opinion that (as the Lord President expressed it) an agreement in terms of the Act did not extinguish the obligation of the original debtor, but left things in substantially the same condition as if, before the passing of the 1874 Act, the purchaser had granted a bond of corroboration without any discharge of the personal obli-

tion of the debtor in the original bond and disposition in security. So it is now clear that an agreement for the transmission of the personal obligation, even when accompanied by an obligation of relief by the purchaser in favour of the original debtor, will not discharge the latter.

From a consideration of the two cases first before quoted, it will be seen that an agreement cannot be implied from any obligation in favour of the disponent, or from facts and circumstances, and accordingly the agreement must be specific in its terms. It is not necessary to use any particular form of words, or the words of the Act itself, provided the agreement is clearly expressed; but it appears to us that the safest way of constituting the agreement is to adopt the phraseology of the Act, *mutatis mutandis*. Sometimes the signature of the disponent is taken to the conveyance. This, although not absolutely necessary, is a prudent course to adopt in the event of summary diligence being used.

Before concluding this article, we would like to draw attention to what may become a serious state of matters, owing chiefly to the facilities introduced by the Act. These facilities are largely taken advantage of, as an examination of the Registers of Sasines will disclose. To the agreement for transmission of the personal obligation, there is usually adhibited an obligation of relief by the purchaser in favour of the seller, and notwithstanding the decision in *Stewart v. Ferguson* above referred to, the seller apparently contents himself with this obligation instead of getting a discharge from the creditor. No doubt there are cases in which the creditor would not grant a discharge without getting payment of his bond, and in some of these cases it may be expedient to be content with the obligation of relief by the purchaser; but in a great number of cases in which the conveyance takes this form, we are sure there is no necessity whatever for following this course,—and the purchaser unnecessarily runs a great risk. Even where a discharge cannot voluntarily be got, it may be the safest course after all to face the difficulty at once, as the not doing so may simply be postponing the evil day. Many security holders, as actions against trustees for neglect of duty unfortunately show, never inquire into the state of the security subject until payment of interest ceases, and then the

creditor probably discovers that the value of the subject has shrunk to considerably less than the amount of his security. This is not infrequently the case, especially in large towns, where the value of residential property, as it becomes old, is gradually decreasing in value. • The all-devouring creditor then turns his attention to his original debtor and "discusses" him. This person, who has perhaps been enjoying his *otium cum dignitate*, and who probably thought, and that perhaps not without reason, that he had long been discharged of this debt, gets a rude awakening. We are aware that cases like this have already happened. Now this is a state of matters for which agents are to some extent to blame. They may not, except in some exceptional cases, be liable for neglect of duty, but they are certainly morally responsible for the extent to which the practice referred to has grown of late years. An agent in circumstances like this should act with great caution, and should, especially when acting for both purchaser and seller, or, it may be, for both the heritable creditor and the seller, preserve evidence of his having advised his clients of their true position. It would be rather awkward if a client alleged that he had trusted to his agent to keep him right in the transaction, and that he understood that what had been done had had the effect of discharging him of all further liability. This is one of those cases in which a practice becomes general, it may be, in some particular locality, and the practice only ceases after some unfortunate agent, trusting that he was right by keeping in the path of general practice, gets mulcted in damages.

The concluding clause of the section provides that "a discharge of the personal obligation of the original or any subsequent debtor, whether granted before or after the commencement of the Act, shall not, where the debt still exists, prejudice the security on the estate or the obligation as hereby made transmissible against the existing proprietor." Formerly, when the personal obligation of the original debtor had been discharged, it was doubtful whether this did not operate a discharge of the real security. Hence the necessity of declaring the debt to be a real burden when the property was conveyed under burden of the debt. Now it is evident that a security constituted by a bond and disposition in

security may exist, with all its consequent rights, irrespective of any personal obligation, provided always, of course, that the debt remains due. In reference to the latter remark, we may point out that it will be proper, when discharging the personal obligation, to reserve always the effect of the real security.

P. S.

Obituary.

MR. W. CHALMERS, Solicitor, Perth, died on 23rd January.

MR. THOMAS STOUT, Writer, Glasgow, died on 29th January. The deceased gentleman, who was seventy-four years of age, was clerk and treasurer to the Faculty of Procurators, and had held these offices for over twenty years.

MR. THOMAS PAUL LEFROY, Q.C., late County Court judge and Chairman of Quarter Sessions of the County Down, and Chancellor of the Diocesan Court of Down, Connor, and Dromore, died on Thursday the 29th January, at the residence of his son, Major Lefroy, at Kingstown, County Dublin, in the eighty-fifth year of his age. He was the second son of the late Right Hon. Thomas Lefroy, many years M.P. for the University of Dublin, and afterwards Lord Chief-Justice of Ireland. He was born in the year 1806, and was educated at Trinity College, Dublin, where he graduated B.A. in 1827, and proceeded to the degree of M.A. in due course. He was called to the Irish Bar at King's Inns, Dublin, in 1831, and speedily acquired a good practice. He obtained a silk gown in 1852, and was elected a Bencher of King's Inns in 1860, and was the senior Bencher of that Society at the time of his death. He was appointed Chairman of the Quarter Sessions of the County Kildare on the 27th December 1858, and in the year 1875 was appointed County Court judge of Armagh, from which he was transferred to Down in 1880. He continued to discharge his judicial duties until December 1890, when he resigned, after having served as chairman for no less than thirty-two years.

The Month.

Marriage with Deceased Wife's Sister Bill.—This annually abortive Bill passed its second reading in the House of Commons on 10th ult.; and was the occasion of the Maiden Speech of the Solicitor-General for Scotland. Sir Charles Pearson cannot be said to have chosen a very exhilarating subject to begin upon. The arguments on the question are so threshed out, and, a few extremists excepted, people care so little either way, that any debate on the topic is foredoomed to be dull.



Mr. Justice Jeune.—Mr. Francis Henry Jeune, Q.C., the newly appointed judge of the Probate, Divorce, and Admiralty Division, was born in 1844. He entered as a student at the Inner Temple in January 1864, and was called to the Bar in November 1868, and chose the South-Eastern Circuit. He was created a Queen's Counsel in 1888. He is a Master of Arts of Balliol College, and a Fellow of Hertford College, Oxford.



Private Bill Work.—The following letter appeared in the *Scotsman* of 16th February:—"Sir, Looking to the attitude of the English Parliamentary Bar towards the Private Bill Legislation Bill for Scotland now before Parliament, and to the uncomplimentary language of Mr. Littler, Q.C., their spokesman, with reference to our Scottish Judges and Bar, I think it would only be a reasonable assertion of our own self-respect as a nation, if the Corporations, and other public bodies having business this session before Parliamentary Committees, sent up counsel from the Scottish Bar to do their work. The expenses would not be greater, they would be certain of having their counsel present during the whole inquiry, and they would be giving those counsel an opportunity of acquiring experience in this class of business which will be most valuable to them when the handling of Private Bills is relegated to a local tribunal, as it must very soon be if

Parliament will only rise above party and recognise national feeling.—I am, etc., R. A. S.”

* * *

Highland Witnesses.—A bevy of Highland witnesses in homespun thronged the Parliament House corridors one day last month, and in Court each was giving his own ideas about a march dyke. One of them was asked whether a certain place was east or west of the said march dyke; and for long the canny Celt was puzzled to say. The question was more than once repeated. “Dear me!” exclaimed the advocate testily, “can’t you answer? Was it east or west of the dyke?” “Well, sir,” replied the witness, slowly and with much deliberation, “it would just be very nearly half way.” We remember another Highland witness in a right-of-way case some years ago, similarly hesitating over a simple question, until counsel lost patience. “Now, sir, do you understand me?” “Yes.” “Then can’t you give me a rational answer to the question?” “No, I cannot,” said the Celt, with some warmth. “And pray, why not?” “Because I’m on my oath!”

* * *

Additional Chancery Judge.—The Lord Chancellor has given an encouraging reception to a joint deputation from the Bar and the Incorporated Law Society, which waited upon him with a view to procuring the appointment of another Chancery judge. Unfortunately, this matter does not rest with Lord Halsbury. The House of Commons has to be consulted, and there are those awaiting the introduction of the proposal to make an attack upon our judicial system. If such an attack is justly to be feared, let it come by all means. This is no reason for withholding increased strength from our judiciary, where by common consent it is most grievously required.—*Law Times.*

* * *

Attorney-General made Law.—“Sir Richard Webster,” says *The World*, “reversing the precedent set by Sir John Coleridge, has declined to give any opinion as to the eligibility of

Roman Catholics to the offices of Lord Chancellor of Great Britain and of Lord Lieutenant of Ireland. Bentham used to object somewhat unreasonably to judge made law. Attorney-General made law is still more questionable. It is conceivable that Lord Coleridge, as Lord Chief-Justice of England, may have to give judgment on a matter upon which Sir John Coleridge, as Attorney-General, had twenty years before expressed a very positive opinion."

* *

Privileged Statement by Adjutant.—Mr. Justice Stephen decided at Nisi Prius, in the case of *Ford v. Blest*, that a letter written by an adjutant of a volunteer regiment to a colonel commanding a regimental district, in answer to an inquiry by the latter concerning an officer of the regiment, is absolutely privileged, although by the regulations of the service all correspondence from the volunteer force must pass through the colonel commanding the volunteers.

* *

Sunday Newspapers.—"Sabbatarians ought to rejoice," says the *Albany Law Journal*, "at a decision of the Minnesota Supreme Court, in *Tribune Publishing Co. v. City of Duluth*, that a newspaper printed and published consecutively on six days in each week, one of which days is Sunday, is 'a daily newspaper' within the intent of a statute. The newspaper was not published on Monday, and thus avoided Sunday labour. Pious people ought to oppose Monday, not Sunday, newspapers."

* *

Defrauding the Slot-Box.—A complicated case was brought into the Central Police Station yesterday afternoon. It was that of a man who had succeeded in beating a "drop-a-nickel-in-the-slot" box on the corner of Third and Jefferson Streets. The man who was able to perform this feat was John Lewis, and he is said to have made a thorough study of the subject before risking his nickel. He first bored a hole in the coin and then fastened to it a small black silk thread. He then dropped the nickel in the slot as directed by the sign, and

drew out a cigar. Seeing that nothing was stated in the directions as to how many times one nickel could be dropped in, he drew his nickel out and dropped it in again. Succeeding the second time, he continued to drop until he emptied the box. By the time he had drawn the twenty-ninth cigar quite a crowd had gathered around him, and cheered him on. Their cries attracted officers Schradel and Donohue, who arrested Lewis and took him from the circle in which he had become a hero. At the station-house the question arose as to what he should be charged with. After several suggestions of robbery, burglary, it was decided to place against him disorderly conduct. He was taken out on bond a little later by some of those whose cries had attracted the police.—*Louisville Courier Journal*.



Cruelty to Neighbours.—According to the *Sun*, “a wild and enthusiastic amateur insisted upon practising the violoncello in his flat every day for eight hours. On Sundays he usually took an extra whack at it, so as to keep his elbows limber for the coming week. He was sued by a West End swell in an adjoining flat, who deposed in Court that the violoncello ‘hurt his feelings until he was near dead.’ The Court decided that no man was justified in practising so many hours a day in ‘mansions.’ It expressed the opinion that three hours a day was quite long enough for a human being to play a violoncello, and this judgment has met with the warmest approval in Great Britain.” We have an indistinct impression that this question has been fought out over a piano in this country. We are reminded of the case of *Pool v. Higginson*, 8 Daly 113, in which the plaintiff vainly sought to restrain the defendant from trundling his teething baby in a carriage overhead by night and day. It was not shown that the noise was unreasonable. The Court concluded that “the plaintiff’s nervous system was in a highly irritated condition,” or that the house must have been built like those in Pentonville, described by Thackeray, “where you hear rather better outside the room than in,” and it observed that “where people indulge their inclination to be gregarious, they must not expect the quiet that belongs to solitude.” But if we were a sufferer from a

violoncello, we should not think of going to law; we would just counter on the fiend with a cornet. — *Albany Law Journal*.

* * *

Mr. Justice Denman.—The professional mind is exercised upon the question why Mr. Justice Denman does not resign. We have every reason to believe that the learned judge himself would desire to retire, but that he is kept in his office by a stronger will than his own—for what purpose it is only possible to conjecture. Every one concerned in the administration of justice should surely recognise that the first duty of persons in authority is to secure that every judicial seat shall be filled by a competent and effective judge, and the reputations of those who retain an office which they do not fill must inevitably suffer—a result unpleasant and unsatisfactory.—*Law Times*.

* * *

A Stringent Law.—One of the last divorce cases tried before Lord Hannen illustrated the stringent consequences which may attend the commission of a matrimonial offence in France, and also threw some light on the evidence which will satisfy the English Court in regard to misconduct which had occurred abroad. The petition was for dissolution of marriage, and the petitioner showed that, having traced his unfaithful wife to Paris, he had found that she was living there with the co-respondent. Thereupon he obtained the aid of the police authorities, and a magistrate with some gendarmes accompanied him to the hotel where the pair were staying, and compelled their attendance before the correctional police. Under articles 337 and 338 of the Penal Code Act, the respondent and co-respondent were accused of adultery and complicity, and, being found guilty, were sentenced, the respondent to two months' and the co-respondent to one month's imprisonment. On appealing from the sentence they were released on bail, and seen no more in Paris. Before the President of the Divorce Division the petitioner himself gave evidence of the facts above stated, and counsel put in the judgment of the French Court in corroboration of the

charge that the parties had been living in adultery. The President accepted the record of judgment as evidence, which sufficiently confirmed the affirmative testimony of the petitioner, and granted a decree *nisi*, with costs, against the correspondent.—*Law Times*.



Thomas Ovens & Sons v. Bo'ness Coal Gas Light Co.—This case, which is one of considerable interest and importance, we report this month, as it may not appear in the Court of Session cases:—

Reparation—Want of precautions for public safety—Gas explosion.—An explosion of coal gas took place within certain buildings, owing to an escape of gas from the main pipe belonging to a Gas Supply Company, laid in an adjoining road. In an action of damages brought by the owners of the premises against the Gas Company, it was proved that the road was made of forced earth, that the pipes were, at the point opposite the buildings, laid in a curve of 2 inches in 9 feet, and that they were laid nearer the surface than was usual. In the specifications for laying the pipes it had been provided that they should be caulked or packed at the joints, but this had not been done. The explosion occurred nearly four years after the laying of the pipes. *Held*, that the pipes had not been laid with reasonable care, and that the defenders were liable in damages.

On 29th November 1889, a serious explosion of gas occurred in the premises of Thomas Ovens & Sons in Borrowstounness. The foreman's dwelling-house and an adjacent laboratory were severely damaged; the stock-in-trade, furniture, up-fittings, and utensils in the laboratory were partly destroyed, and damage was done to the roofs of two sheds.

The cause of the damage was the explosion of a large quantity of gas which had escaped from the main pipe of the Borrowstounness Coal Gas Light Company, and had lodged under the grate of Ovens & Sons' foreman's house, where it had been ignited in the morning. The main pipe passed along under the roadway in front of Ovens' premises, and had been laid there in July 1886.

Ovens & Sons raised an action of damages against the Gas Company, concluding for £258.

The defenders pleaded—The defenders are entitled to absolver in respect—(a) that the said accident was a *damnum fatale*; or (b) that the pursuers' loss was not occasioned by any fault or negligence on the part of the defenders.

A proof was led: It was proved that the road under which the pipes were laid was of forced earth or slag, and entirely artificial. The pipes were 9 feet long each, and were not spigot and faucet pipes, but turned and bored pipes—i.e. each pipe tapered for some little distance at the one end, and opened out at the other, so that they fitted the one into the other. When driven home in a straight line, they fitted closely. At the point in question, however, there was a curve of 2 inches every 9 feet, and the bulk of the evidence showed that in such circumstances this kind of pipe should for safety have been secured at the joints by lead or by a packing or caulking of yarn. In the specification given out by the defenders at the time of the laying of the pipes in July 1886, the contractor was taken bound to make all joint holes of sufficient size to allow joints of pipes to be well caulked home. This was not done, however, nor was there any lead in the joints. After the accident took place the joints were leaded at this point. The depth of the pipes from the surface was about 2 feet.

The Lord Ordinary (Trayner) assolizied the defenders.* The pursuers reclaimed, and argued: There was fault here in several particulars, all showing negligence in the laying of the pipes. As to the law of the case, the real rule was *sic utere tuo, ut alienum non lædas*. It was not contended that there was liability *ex dominio solo*, i.e. from the mere fact of property. The doctrine of *Fletcher's case*,† although there were expressions used in it that seemed to imply an absolute obligation to insure neighbours against damage, really rested

* "In a word, I am of opinion, on the proof, that there is no fault in laying the pipes in question along a curve; that there was no fault in their not being packed at the joints; and that the want of packing (even if it should have been there) was not the cause of the explosion. If I am right in these views, the defenders are entitled to absolver, on the authority of the case of *Campbell v. Kennedy*, 25th Nov. 1864, 3 Macph. 121; 37 Scot. Jur. 62."

† *Rylands v. Fletcher*, 1868, L. R. 3 E. & T. App. 330 (water reservoir).

liability upon *culpa*. When a man sets up something that is dangerous he had a duty of care and caution to take care that it did not escape. To say that he did it "at his peril" was to put his obligation too high, for it then at once became necessary to introduce exceptions, beginning with "the act of God," to set limits to his liability. That was at least the extent to which the Courts of Scotland had sanctioned and adopted the rule of *Fletcher's case*.^{*} The Lord Justice-Clerk (Moncreiff) had put the obligation forcibly and soundly in *Chalmers' case*:^{*} "I think that *culpa* does lie at the root of the matter. If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precaution will prevent injury, in which case he is liable for his original act in placing the materials on the ground." That doctrine had indeed been applied in Scotland before *Fletcher's case* was decided.[†] The person making the *opus* must take the care and caution that were appropriate in the circumstances. Applying that doctrine here, the defenders were bound to get the best pipes and secure them in the best possible manner. Nor was there any *damnum fatale*, i.e. a circumstance "which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility."[‡] The mere statement of the case disposed of that contention. In the cases of *Carstairs* § and *Anderson*,|| again, quoted on the other side, the ground of absolvitor was the common use that both plaintiff and defendant had of the thing which caused the damage. It was for their common benefit. There was no such case here, for the only use the pursuers had of the dangerous con-

^{*} *Chalmers v. Dickson*, Feb. 1876, 3 R. 461 (ironstone bing). *Moffat & Co. v. Park*, Oct. 16, 1877, 5 R. 13 (water pipe bursting in a house).

[†] *Kerr v. Earl of Orkney*, Dec. 17, 1857, 20 D. 298; 30 Scot. Jur. 158 (water dam).

[‡] Lord Westbury (C.) in *Tennent v. Earl of Glasgow*, March 3, 1864, 2 M. (H. of L.) 22; 36 Scot. Jur. 400 (river dammed back by a dyke).

§ *Carstairs and Another v. Taylor*, 1871, L. R. 6 Ex. 217 (cistern in an upper storey).

|| *Anderson v. Oppenheimer*, 1880, L. R. 5 Q.B.D. 602 (bursting of water pipe).

struction was as members of the public. In *Ross's* case,* again, the ground of judgment was that the use of the subject taken there was the natural use of the subject, and that therefore the principle of *Fletcher's* case, which hinged entirely upon the construction by the defender of an *opus manufactum*, a non-natural use of the subject was not present. The non-natural use of the subject, i.e. the introduction of a steam-engine on a tramway, was the *ratio* in *Jones's* case † also.

The defenders argued: There was no fault shown to have existed on their part. It was easy to be wise after the event, but they had a respectable body of evidence to the effect that the method of trying the pipes which they had adopted was reasonably safe. That all had gone well for four years was proof that the original construction had been reasonably good. Accidents would occur, but unforeseen accidents were *damna fatalia*, and for these they could not be made responsible.‡ *Culpa* must be proved.§ In the circumstances of this case, where the pipes were laid in the knowledge of every one in the locality, and where it could not be said that the operation was extraordinarily hazardous, or anything but a familiar and everyday operation, the main considerations which determined *Fletcher's* case were absent. Gas was now an ordinary necessity of life, and roadways were used for the passage of gas-pipes as of water-pipes every day. That brought the case within the principle of *Ross's* case. But then, again, the pipes were laid partly for the pursuers' benefit. It was from them that they drew their supply of gas, and those who took along with the defenders a common benefit from the defenders' property must take the risks of misadventure incidental to the use of that property or to its existence. ||

LORD JUSTICE-CLERK: Some very wide questions have been raised in this debate as to the criterion of liability in cases like the present, and if it were necessary to go over the cases

* *Ross v. Fedden*, 1872, L. R. 7 Q.B. 661 (water-closet in upper storey).

† *Jones v. Festiniog Ry. Co.*, 1868, L. R. 3 Q.B. 733.

‡ *Tennent*, 2 M. (H. of L.) 22; 31 Scot. Jur. 400.

§ *Campbell*, 3 M. 121; 37 Scot. Jur. 62 (water pipe bursting in house). *Mackintosh v. Mackintosh*, July 15, 1864, 2 M. 1357; 36 Scot. Jur. 678 (muir burning).

|| *Anderson v. Oppenheimer*, 1880, L. R. 5 Q.B.D. 602. *Carstairs*, 1871, L.R. 6 Ex. 217.

cited and to consider these questions, we should have required to take time for deliberation.

But, as the case presents itself to my mind, it is not necessary to go into these elaborate issues. The true issue is: Were the defenders in fault? Was there failure on their part to execute the work with due and reasonable care? And was their failure to do so the cause of an accident?

Now, in the first place, the evidence shows that the defenders worked with forced and loose earth, which was in a shaky condition, and liable to subsidence.

In the next place, the defenders were laying down these pipes upon a curve, on a considerable *radius*, involving that each pipe should be some two inches off the straight.

The kind of pipe they adopted was a pipe with a wedge-shaped hole at one end, which should serve as a socket, and a wedge-shaped point at the other end, so that each pipe should fit into the socket of the next. Now these pipes are sometimes constructed so as to be used without packing; sometimes they are constructed so as to need packing. The defenders used the kind which required packing, and gave out specifications which required that packing should be used. But in spite of that no packing was actually used. As, however, the defenders specified for packing, we must take it that, knowing their own business, they thought that packing was a prudent thing to do.

The pipes also were laid near the surface at the point in question. That being so, there was all the greater risk of the pipes being subjected to some more than ordinary strain, particularly as they were laid in forced earth.

In my opinion, therefore, there was fault on the part of the defenders. Indeed, the fact of the severe explosion is by itself a very material fact, for it shows that there must have been some serious defect in the arrangement of these pipes. The defenders did not, as I think, execute the work with reasonable care and skill.

I think, therefore, that the interlocutor of the Lord Ordinary must be recalled.

LORD YOUNG: This record is remarkable in this respect, that there is no plea by the defenders against the relevancy of the action. I highly commend that, for no question of

relevancy was raised, and I do not myself doubt the relevancy.

But the reason I make the remark is that, that being so, the only question for us is the question of fact: Are the pursuers' averments established?

Now I think they are established. I agree that, having regard to the nature of the ground, which was forced earth, there should have been packing, and that, as the pipes were laid on a curve, extra strength should have been given to the joints by running them with lead. In short, I think that these pipes were faultily laid.

Lord RUTHERFURD CLARK concurred.

The Court recalled the Lord Ordinary's judgment, and gave decree for the sum sued for.

Counsel for Pursuers (Reclaimers): Graham Murray, Salvesen, C. N. Johnston. Agents: Smith & Mason, S.S.C.

Counsel for Defenders (Respondents): Guthrie, Wilson. Agents: J. & A. Peddie & Ivory, W.S.

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A President's Properties.—Lord Hannen has taken with him from the Divorce Court the large old-fashioned arm-chair and writing-desk which have belonged to the judge of the Court ever since its establishment. Originally they were the property of Sir Cresswell Cresswell, were purchased by his successor, Lord Penzance, and were by him passed on to Sir James Hannen. Very many heirlooms do not possess a tithe of the historical interest of this old chair and desk.

* *

Can Lawyers be Honest?—Seeing that Mr. Homer Greene had an article in the *North American*, entitled "Can Lawyers be Honest?" we bought a copy. If we had known that he answers the question in the negative, we would have tried to steal a copy. Mr. Homer Greene seems in a "questionable shape." In nine pages he asks himself exactly sixty questions. There is one more he ought to ask—"Can Mr. Homer Greene be sensible?" and we would unanimously answer, No! Let Mr. Homer Greene join himself unto Mr. Edward Bellamy, and gently pass away. He wearies us. In the

same number Mrs. Kate Gannett Wells asks, or says, "Why no more women marry." That is an easy one. Answer: Because they are not asked. Now let Eliza Wheeler Wilcox ask something.—*Albany Law Times*.

* * *

"I ASSURE you, gentlemen," said a convict upon entering the prison, "the place has sought me, and not I the place. My own affairs really demand all my time and attention, and I may truly say that my selection to fill this position was an entire surprise. Had I consulted my own interests, I should have peremptorily declined to serve; but as I am in the hands of my friends, I see no other course but to submit." And he submitted.—*Green Bag*.

* * *

Innkeeper's Liability.—A most interesting point on the subject of the liability of innkeepers arose in the Court of Appeal on the 6th ult. This was an action brought by one Medawar against the Grand Hotel Company Limited. It appeared that the plaintiff, upon the morning of the Grand National Steeplechase, arrived at the defendants' hotel. Owing to the great influx of visitors for the races, the defendants were unable to give plaintiff a room; they, however, allowed him to make use of a room which was already let for the following night, for the purpose of washing and dressing. The plaintiff went up to the room, opened his dressing bag, and took out the stand that was in it containing ivory brushes, jewellery, and other like articles. When he had performed his ablutions he went downstairs to breakfast. After breakfast he went out, and did not return till night, when he found that his luggage had been moved to another room, and that some jewellery had been stolen from the bag. The action was first tried before Mr. Justice Smith, without a jury, who gave judgment for the defendants. There was a doubt whether the jewellery was stolen whilst in the room where the plaintiff had dressed, or whilst the bag was in the hotel corridor where it had been placed by the porter prior to the change of rooms. Lord Esher, in giving judgment for the appellant, remarked that it was clear that the relation of

guest and innkeeper existed, and it lay with the defendants to show contributory negligence by the plaintiff of such a character as to prevent his recovering for the loss he had sustained. The plaintiff was clearly negligent in leaving his bag open and the stand with jewels in it lying about; but the defendants were also grossly negligent in removing the things as they were into the corridor and leaving them there. They therefore would be unable to rely upon the plaintiff's negligence. He therefore held the defendants liable, but limited their loss to £30, the amount specified by the Act 26 & 27 Vict. c. 41. Lord Justice Bowen, in concurring, expressed the opinion that the point was one most interesting to lawyers. Lord Justice Fry differed as to the inference to be drawn from the facts, and maintained that the loss was one entirely due to the carelessness of the plaintiff. Judgment was accordingly entered for the appellant for £30.—*Law Times*.

* * *

The Assault on the Lord President.—In connection with some comments on the assault recently made on the Lord President of the Court of Session, it may not be amiss to quote an old Act of the Scots Parliament, that of 15th November 1600, "anent invading and persewing of counsellors :"—"Our Sovereigne Lord and Estates of this present Parliament, understanding that diverse of the Lords of his Heighness Secret Counsell and Session, and others of his Heighness officers, for discharge of their bounden duty in his Heighness service, incurres the haitred, indignation, malice, and feid of sundry persons, who oftentimes quarrels them without any just cause : Therefore, statutes and ordeins, that what-som-ever person in time comming, invades or persewes any of his Heighness Session or Secret Counsell, or any his Heighness officers, it being verified and tryed, that any of the saids Counsellors, Sessioners, and officers, was persewed and invaded for doing of his Heighness service, shall be punished to the death."

* * *

Registration Reform.—Two Government Bills in relation to the registration of electors are now before the House of

Commons. One it is proposed to call the Electoral Disabilities Removal Act 1891, and the other the Electors' Registration Acceleration Act 1891. By the Disabilities Removal Bill, "a man shall not be disqualified from being registered," whether in the parliamentary or local government register, "by reason only that during part of the qualifying period not exceeding four months at any one time, he has, in the performance of any duty arising from or incidental to any office, service, or employment, been absent from the premises qualifying him to vote." By the Registration Acceleration Bill, which is very properly prefaced by a memorandum as to its why and wherefore, the whole preparation of the electoral lists is to be accelerated, because the time at present allowed "is too short to allow in many cases of the due completion of the register," and it is also proposed to make the parliamentary register come into force on the 1st November instead of the 1st January. A neat, though very long table of "substituted dates," for "publication by overseers of copy of register," etc., is appended in a schedule to the Bill, the 1st June being substituted for the 20th June, and so on. Between them the two Bills, when passed, as passed no doubt they will be, will greatly puzzle overseers and torment revising barristers.—*Law Times*.

Reviews.

The Scottish Law of Conveyancing. Heritable Rights. By JOHN CRAIGIE, M.A., LL.B., Advocate. Second Edition revised and enlarged. Edinburgh: Bell & Bradfute 1891.

IN preparing a second edition of his convenient work, Mr. Craigie has both carefully revised and considerably enlarged the contents. The chapter on the Principles of the Scottish Law of Conveyancing, and on Tenures, and that on Feu Charter, Blench Charter, Feu Disposition, and Feu Contract have been rewritten. The popularity of the book will be more than maintained by the improvements now made.

Curiosities of Law and Lawyers. By CROAKE JAMES. New Edition, greatly enlarged. London: Sampson Low. 1891.

THIS is an interesting collection of anecdotes regarding the law and its votaries, by one who has "retired after half a century's practice of the law." The anecdotes, however, are not limited, as in recent well-known reminiscences, to the author's own experience. They are gathered from manifold sources, and relate to all climes and times. We have not much praise to give to the scheme of arrangement, and still less to the consistency with which it has been carried out. Within the 770 closely-printed pages, moreover, will be found a large quantity of matter which is destitute of all point, humour, or interest; and caprice is shown in the selection of some dreary "curiosities" of early legal customs and the omission of the rest which are no more pointless than those chosen. But the book is, on the whole, amusing, and contains many a good story.

The Law and Practice under the Companies Acts 1862 to 1890; The Life Assurance Companies Acts 1870 to 1872. Containing the Statutes, and the Rules, Orders, and Forms to regulate Proceedings. By H. BURTON BUCKLEY, M.A., of Lincoln's Inn, Esq., one of Her Majesty's Counsel. Sixth Edition. London: Stevens & Haynes. 1891.

MR. BUCKLEY's sixth edition has been prepared entirely by himself. No higher recommendation than the statement of this fact could be given it in the view of any one who has made the acquaintance of former editions. The work now includes three new Acts of Parliament. The Companies (Memorandum of Association) Act, The Companies (Winding-up) Act, and The Directors' Liability Act, all of last year—the last of these being sarcastically described by the author as "deterrent; conceived as a terror to the prospectus-maker, and calculated to increase the income of the competent expert who has no scruples." The judicial decisions during the last

three years have, it is needless to say, been very numerous. What figures so often in rubric or headnote as the inevitable and comprehensive "Company;" and the litigiousity of directors and liquidators now and again raises a point of legal interest. The recent decisions "spread themselves over the whole field of the subject" of Mr. Buckley's book. The edition under notice contains the new Rules of Procedure under the Winding-up Act 1890. These orders do not concern, and the said Act itself only indirectly concerns, Scottish lawyers. But the work is as indispensable to Scottish lawyers as it is to English.

A Fragment on Government. By JEREMY BENTHAM. Edited, with an Introduction, by F. C. MONTAGUE, M.A., Late Fellow of Oriel College. Oxford: Clarendon Press. 1891.

Too much praise cannot be given to Mr. Montague's Introductory Treatise on Bentham in the work before us. It is admirable, and will arouse in many a fresh and, perhaps, novel interest in Bentham and his writings. In the editor's preface the object of the publication is thus modestly set out: "The bulk of Bentham's writings has passed into not unjust oblivion. It would be impossible to renew the life of works so voluminous, so technical, and so frequently disfigured by oddities of thought and style. But it would be unfortunate if those works which most adequately represent Bentham's peculiar genius, and which have left a mark upon speculation in England, were to remain buried under the weight of dead, unprofitable matter. These works may the more easily be made available, inasmuch as they are few and not of great length. Chief amongst them are the *Fragment on Government* and the *Principles of Morals and Legislation*. The latter treatise has already been reprinted by the Clarendon Press. The *Fragment on Government*, which has long been out of print, is now offered to the public." No doubt members of the public who do not have a copy of the *Fragment* will welcome the opportunity of obtaining it, and those who possess old editions

will welcome one in the admirable typography of the Clarendon Press. But the great merit of the publication is Mr. Montague's biography of Bentham, and his estimate of him as a thinker and political philosopher. It is a valuable contribution to the true appreciation of Bentham.

English Decisions.

DECEMBER—FEBRUARY.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

COMPANY.—*Reduction of capital — Ultra vires.*—A company, which had both ordinary and preference shares, desired to reduce the former only. A petition was presented for sanction of the Court to a special resolution of the company for the reduction of its capital. Such sanction had been refused by Mr. Justice Kay in *The Union Plate Glass Company*, 42 Ch. Div. 514; but it was given by Mr. Justice North in *The Galling Gun Company*, 43 Ch. Div. *Held* (by Mr. Justice Kekewich), that the company had power, under the Companies Acts 1867 and 1877, to reduce one class of capital without reducing another class; and that the resolution ought to be sanctioned.—*Re Agricultural Hotel Company*, High Ct., Ch. Div., 20 December.

COUNTY AND BOROUGH.—*Police rate—Right to recover rate improperly levied.*—The borough of Bootle was incorporated in 1868, and prior to its incorporation it had been provided with police by the county of Lancashire. After the incorporation in 1868, the borough and county allowed matters, with regard to the police, including the method of rating, to go on as they had done; but in 1887 it was discovered that, under 2 & 3 Vict. c. 93, sec. 24, the borough ought to appoint and maintain its own police, which was therefore done thenceforth. At this date the County Justices had unexpended in their hands money levied by the county by rate from the inhabitants of Bootle for the police purposes of the borough. This action was brought to recover the money from the County Council of Lancashire, who had taken the place of the Justices for rating and other purposes. The defendants claimed to set off an unascertained sum in respect of the police superannuation for police constables, part of whose time had been passed in duties in the borough. Amongst other arguments on behalf of the plaintiffs, it was said that the money claimed could be recovered as having been extorted. *Held* (by Lord Justices Lindley, Bowen, and Fry, reversing the decision of Mr. Justice Smith), that there

had been no extortion, that there was no authority showing that rates paid could be recovered back by action, and that the action could not be maintained.—*Mayor, etc., of Bootle-cum-Linacre v. County Council of Lancashire*, Court of Appeal, 20 December.

CONDONATION OF CRIMINAL OFFENCE.—*Regulation of Railways Act 1889* (52 & 53 Vict. c. 57), sec. 5, sub-sec. 3.—*Penalties for travelling with intent to avoid payment of fare.*—This was a special case stated by a police magistrate. By sec. 5, sub-sec. 3, of Regulation of Railways Act 1889 (52 & 53 Vict. c. 57), it is provided that "any person who travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof, shall be liable to a penalty of 40s." A porter at Westbourne Park Station found three young men travelling in a first-class carriage, who, on being asked for their tickets, produced only second-class ones. The porter then asked them for the excess fare, which they refused to pay. The magistrate stopped the case, holding that by demanding the excess fare, the company must be taken to have abandoned their right to proceed criminally, and could only recover the fare as a civil debt. The only question raised was whether the magistrate was right in so holding. *Held* (by Baron Pollock and Mr. Justice Charles), that the company were not barred from proceeding criminally by demanding the fare. The appeal was therefore allowed, and the case sent back to the magistrate to be determined upon the merits.—*Noble v. Killick*, High Ct., Q. B. Div., 13 January.

SLANDER.—*Privilege—Presence of persons not interested.*—*Held* (by Lord Esher, Sir James Hannen, and Lord Justice Fry), that the privilege attaching to a defamatory statement which is made as a matter of duty to persons who are interested, is not removed by the fact of the presence of others who are not interested, provided that it is not in the power of the speaker to prevent these being present.—*Pittard v. Oliver*, Ct. of App., 14 January.

CHARITABLE BEQUEST.—*Interest in land—Mortgage by Corporation—Assignment of "rents, rates, and waterworks"—Mortmain.*—This was a question whether a "Borough of Preston waterworks mortgage" for £150 ought to be treated as pure personalty so as to pass under a bequest for charitable purposes contained in the will of a testatrix who died in 1883. The mortgage in question was expressed to be made by virtue of the Preston Waterworks Act 1853, the Local Government Supplemental Act 1861, and the Preston Improvement Act 1869, and by it the Corporation of Preston, in exercise of their powers, and in consideration of the sum of £150 paid by the testatrix, thereafter called the mortgagee, for the purposes of the said Acts granted and assigned to the mortgagee, "her executors, administrators, and assigns," such proportion of the "rents, rates, and waterworks" which, by the said Acts, the Corporation were authorised to charge, levy, purchase, and make as the principal sum bore or should bear to the whole sum which

was or should be borrowed, to hold the said premises to the mortgagee, her executors, administrators, and assigns, until the whole of the principal sum with interest at the rate of $3\frac{1}{2}$ per cent. should be fully paid and satisfied. On behalf of the next of kin, it was contended that the mortgage debt, being a charge upon rents and waterworks, was an interest in land, and therefore could not be validly bequeathed to a charity. *Held* (by Mr. Justice Stirling), that it plainly appeared from the Acts referred to in the mortgage, that the Legislature intended that the waterworks should, notwithstanding the mortgages which the Corporation were authorised to make, continue as a going concern under the control and management of the Corporation; that the mortgage must be construed as a charge upon the undertaking authorised, and the rents and rates arising under the Acts; and that the mortgage debt was pure personalty, and was therefore validly bequeathed to the charity. —*Re Parker; Wignall v. Park*, High Ct., Ch. Div., 14 January.

HUSBAND AND WIFE. — *Husband's succession to undisposed-of separate property of deceased wife*—*Liability—Debts*—45 & 46 *Vict. c. 75, secs. 3 and 23 (Married Women's Property Act 1882)*.—The deceased wife of W., whom she married in 1881, held certain leaseholds as her own separate property from the year 1862 up to March 1889, when she died leaving them undisposed of. In the year 1885 and afterwards, she, on her own account, borrowed various sums of money from S., which with interest remained owing and unpaid at the date of her death, when her husband W. succeeded to the leaseholds by marital right, and took out no letters of administration. On the 4th February 1890, S. brought an action in the Warwickshire County Court against W., to recover £36, money lent to his deceased wife. The learned County Court judge gave judgment for the defendant. The plaintiff appealed. *Held* (by Baron Pollock and Mr. Justice Charles), that the defendant was liable under sec. 23 of the Married Women's Property Act 1882, as the legal personal representative of his deceased wife for the purpose of paying her debts out of her separate estate coming to him.—*Surman v. Wharton*, High Ct., Q. B. Div., 14 January.

PATENT.—*Infringement—Prior publication—International convention—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), sec. 103, sub-secs. (1) and (2)*.—On the 5th July 1887 the assignors of the plaintiffs applied for letters patent for an improved process and apparatus for tanning by aid of electricity; and they were granted and sealed as of that day. On the 14th December 1886 a French patent had been taken out by the same patentees for the same invention. On the 12th April 1887 the same patent was obtained in America, and on the 25th April 1887 a copy of this United States patent was published in the English Patent Office. The defendants' patent for a process of tanning by the aid of electricity was granted on the 17th January 1888. In an action

by the plaintiffs against the defendants for an alleged infringement, the defendants relied upon the prior publication of the plaintiffs' patent on the 25th April 1887. The plaintiffs urged that they were protected by section 103 of the Patents Act 1883. By that section, sub-sec. (1), it was enacted that where an international arrangement for the mutual protection of inventions, designs, or trade marks had been made, any person who had taken out a patent in a foreign State, should be entitled to a patent under the Patents Act, in priority to other applicants, and his patent should "have the same date as the date of the protection obtained in such foreign State, provided that his application is made, in the case of a patent, within seven months . . . from his applying for protection in the foreign State with which the arrangement is in force. Sub-section (2) provided that the publication in the United Kingdom (during that period of seven months) of any description of the invention should not invalidate the patent which might be granted for the invention. An international arrangement of the character indicated had been made by England with France. *Held* (by Mr. Justice Romer), that under the 103rd section of the Patents Act the patentee had a double right; either he might come in under the convention, and have his patent antedated so as to obtain the limited rights given by the section, or he might take out the ordinary patent for the full period; the plaintiffs had taken the latter course; the date of the patent was conclusive; and, there having been an admitted prior publication of the invention in England, they were not protected by the 103rd section.—*The British Tanning Company v. Groth*, High Ct., Ch. Div., 15 January.

TRUSTEE.—*Power to vary investments*—*Trustee Investment Act 1889* (52 & 53 Vict. c. 32), secs. 3 and 6.—A testator, who died in 1858, left a will dated 1844. The trustees of the will had properly invested a considerable sum of money under the trusts of the will in Government securities, but the will contained no power to vary the investments. *Held* (by Lords Justices Lindley, Fry, and Kay), that the power to vary investments given by sec. 3 of the Trustee Investment Act 1889, applies to all investments referred to in that section, whether made under the power in the Act or by the settlor or testator, or by the trustees since the creation of the trust, and therefore the trustees had power to sell the Government securities in their hands and to invest the proceeds in a mortgage of freehold estates.—*Re Dick; Lopes v. Dick*, Court of Appeal, 16 January.

MORTGAGE.—*Fraud*—*Transfer of mortgage*—*Validity*.—The mortgagee in possession of certain copyhold property was, on the 2nd November 1882, by the fraud of her solicitor, induced to sign a deed without knowing the purport or contents thereof. The deed, after reciting that the solicitor had agreed to pay to the mortgagee the amount due to her upon the mortgage, purported to transfer to the solicitor the mortgage debt and the securities for the same.

The solicitor had for some time collected the rents of the property on behalf of the mortgagee, and he continued to do so until he absconded in April 1888. In November 1882 the solicitor deposited the deeds of the property in question with the plaintiff as security for an advance to him of £250. In May 1889 the trustee in bankruptcy of the estate of the solicitor executed a deed mortgaging the property to the plaintiff, who was subsequently admitted as tenant on the rolls of the court of the manor. The plaintiff in the present action sought to recover the possession of the property from the defendant, who held it as tenant of the original mortgagee. The County Court judge found as a fact that the mortgagee thought, when she signed the deed on the 2nd November 1882, that she was only signing a lease of the property, and that she never intended to deal with her mortgage or with her possession thereunder; and further, that there had been no negligence on her part in signing the deed. *Held* (by Baron Pollock and Mr. Justice Charles), that in no sense could the mind of the mortgagee be said to have gone with the deed which she signed, and that, therefore, the plaintiff had not made out his title, and the defendant was entitled to judgment.—*Fewell v. Wright*, High Ct., Q. B. Div., 19 January.

CARRIAGE OF GOODS.—*Charter-party—Perils of the seas—Negligence.*—By the terms of a charter-party and bill of lading, the owners of the steamship *C.* were relieved from liability for damage to cargo when caused by “perils of the sea and accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.” The cargo was damaged by sea-water which got into the hold through the loosening of an iron rivet. The master having discovered during the voyage that there was leakage, took no steps to remedy it. The owners of cargo having sued the shipowners in the County Court, the judge held that the leak was caused by a peril of the sea or accident of navigation, but the defendants ought on discovering it to have remedied it, and that, although they were not liable for any damage up to the time when they might have remedied it, they were liable for all damage subsequent thereto. *Held* (by Sir James Hannen and Mr. Justice Butt), that, even assuming the master was negligent in not stopping the leak, the defendants were by the terms of the charter-party and bill of lading exempt from all liability.—*The Cressington*, High Ct., Probate, Divorce, and Admiralty Div., 19 January.

DIVORCE.—*Cruelty—Delay—Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), secs. 27, 31.*—A wife petitioned for dissolution of the marriage on the grounds of the alleged cruelty and adultery of the husband. The case came on in the Probate and Divorce Division on the 31st October, and was undefended. The adultery was established, but Butt (J.) ordered the case to stand over for the purpose of giving the Queen’s Proctor an opportunity to instruct counsel to argue the case on the point of cruelty. This was done,

and the case came on for argument. The marriage had taken place in 1858, the husband being twenty-three and the wife seventeen years of age. The first few years were fairly happy. Then the husband committed adultery with more than one woman, and frequently flaunted his amours before his wife, telling her that he liked this or that woman better than herself, neglecting her for the society of women of loose character, and caused her so much mental worry and annoyance that, as was alleged, her health was injured. No cruelty in the nature of bodily violence was proved, but it was contended that sufficient had been shown to establish cruelty within the Matrimonial Causes Act 1857, sec. 27. In 1877 the husband and wife separated by deed, and no proceedings had been taken by the wife until the only son of the marriage came of age, when this petition was presented. Mr. Justice Butt refused to grant a divorce, on the ground that the cruelty was not established. *Held* (by Lords Justices Lindley, Lopes, and Kay), without deciding whether the petitioner had made out a case of cruelty or not, that there had been such unexplained delay in taking proceedings as to disentitle her to a divorce.—*Beauclerk v. Beauclerk*, Court of Appeal, 19 January.

DIVORCE.—*Conditional decree nisi*—*Allowance by husband for wife's maintenance*—*Dum casta et sola*.—The husband petitioned for divorce, and obtained a decree *nisi* on the ground of his wife's adultery with one out of three co-respondents charged upon the record. The parties were married in April 1873, and never cohabited after January 1874, when a child was born, and the respondent's mind became temporarily deranged. The petitioner, fearing a recurrence of the insanity, never resumed cohabitation with his wife, but made her an allowance of £1 a week for the support of herself and child. In May 1879 he took away the child against the desire of the respondent, whom, however, he allowed to have access to the child. The first date at which adultery was alleged was 1883, subsequently to which time the respondent gave birth to several illegitimate children. The Court, in pronouncing decree *nisi*, intimated that it would not be made absolute unless and until the petitioner should secure an amount for the support of the respondent. The parties subsequently agreed upon fifteen shillings a week; but, upon the motion to make the decree absolute, a contest arose as to whether the payments were only to continue so long as the respondent should remain chaste and unmarried, or whether the order for maintenance should contain no clause *dum casta et sola vixerit*. *Held* (by Sir James Hannen), that the agreed amount per week must be paid or secured to the respondent by the petitioner, without any restrictive clause.—*Lander v. Lander*, High Ct., Probate, Divorce, and Admiralty Div., 21 January.

MORTGAGOR AND MORTGAGEE.—*Valuation*—*Negligence*—*Loss*.—A firm of valuers was employed to value certain property with a view to its being offered as a mortgage security. The valuers were suggested by a firm of solicitors who were to find a mortgagee,

being understood, both by the valuers and the solicitors, that the valuation was to be made on behalf of the intended mortgagee. The plaintiff, who was a client of the solicitors, became the mortgagee, as all parties understood, on the faith of the valuation being made by the valuers as her advisers. The valuation was not, in the opinion of the Court, conducted with due skill and care, and the security turned out greatly insufficient. The plaintiff brought an action for damages against the valuers and the solicitors for negligence and breach of duty. As against the solicitors, it appeared that they were aware that there had been in previous dealings with the property some striking differences in the prices paid for it, but that the solicitors having called the attention of the valuers to this fact, the valuers adhered to their valuation, and the solicitors had not told the plaintiff of the difference in prices. *Held* (by Mr. Justice Romer), that, as the solicitors knew that the plaintiff relied upon the valuation and would be guided by it, no negligence had been shown by the solicitors, and the plaintiff had no claim against them; as regards the valuers, that there being a contractual relation between them and the plaintiff, they were liable in damages by reason of their not having used due skill and care; further, that in the absence of any contractual relation between the valuers and plaintiff, *i.e.* if the plaintiff had been in a legal sense a stranger to the valuers, the action could not have succeeded against them except as an action of deceit, in which case, after the decision of the House of Lords in *Derry v. Peek* (14 App. Cas. 337), it would have been necessary to show fraud; nor, in the absence of fraud and of contractual relation, would the valuers have been liable on the ground of having invited the plaintiff to act upon their valuation.—*Scholes v. Brook*, High Ct., Ch. Div., 21 January.

CONTRACT TO EMPLOY AS AGENT.—*Physical impossibility to perform contract.*—By an agreement, dated the 31st January 1887, in consideration of the agreement of the plaintiff, the defendant, who was a shirt, collar, and cuff manufacturer, agreed to employ the defendant as his agent, canvasser, and traveller, and it was agreed that the agency should be determinable by either party at the end of five years from the date of the agreement, upon three calendar months' notice in writing; that the plaintiff should not sell any shirts, collars, or cuffs, during the time he should be in the defendant's employ, for any other company or firm; and that the defendant should pay the plaintiff 3½ per cent. commission on all goods sold by him for the defendant. In March 1889 the manufacturing premises of the defendant were destroyed by an accidental fire, and he thenceforth ceased to carry on his business or employ the plaintiff as his agent. The plaintiff sued for damages for breach of the agreement, and the jury awarded him £125. Mr. Justice Grantham reserved the case for further consideration, and, upon argument, gave judgment for the defendant, on the ground that the performance of his contract by the defendant had been rendered impossible by the fire. *Held* (by Lords Justices

Lindley, Lopes, and Kay), on appeal, that there was no condition implied in the agreement that the plaintiff should be supplied with goods only from the manufactory which was destroyed by fire, and that, therefore, the performance of the contract had not been rendered a physical impossibility, and the plaintiff was entitled to damages.—*Turner v. Goldsmith*, Court of Appeal, 23 January.

LEGACY DUTY.—*Payment to trustees for managing business*—8 & 9 *Vict. c. 76, sec. 4*.—T. by will appointed three trustees, and directed them to carry on his business in conjunction with his son, J. R. T., who was a beneficiary under his will, and he directed that so long as the trustees should be carrying on his business they should each receive £250 per annum out of the profits thereof, and that if in any year the profits should be 25 per cent. in excess of the profits in the year before the testator's death, the trustees should each receive £500. And he declared that while J. R. T. should be associated with the trustees in the management of the business, he should receive a like annual payment. The testator gave the trustees special powers of management, including the power to appoint a manager and pay him a salary. By a codicil the testator appointed three other trustees in place of those appointed by his will, and gave each a legacy for his trouble. The trustees appointed by the codicil managed the business in conjunction with J. R. T. for some years, and all four received the annual payments directed by the will. T.'s estate was administered in Court, and the trustees presented this petition to ascertain whether these annual payments were subject to legacy duty. *Held* (by Mr. Justice North), that the annual payments both to the trustees and J. R. T. were beneficial gifts made by the will, and not merely payments by way of salary for services rendered, and were, therefore, subject to duty.—*Re Thorley; Thorley v. Massam*, High Ct., Ch. Div., 23 January.

CRIMINAL LAW.—*Manufacture of false evidence*—*Perversion of due course of justice*—*Tampering with arbitration samples*.—The prisoner was indicted for having unlawfully, knowingly, and designedly altered the character of the contents of certain sample bags of wheat which had become, and were, evidence to be used before arbitrators appointed in accordance with the terms of a contract to decide any question that might be in dispute between the buyers and sellers of a cargo of wheat, with intent thereby to pass the same off as true and genuine samples of the bulk of such cargo, and thereby to injure and prejudice the buyers of the cargo, and to pervert the due course of law and justice. By a contract for the sale of a cargo of wheat, certain stipulations were made for the settling of any disputes that might arise by arbitration; and for the purposes of being used as evidence in any such arbitration, samples were taken from the bulk by the prisoner on behalf of the seller and by another person on behalf of the purchaser. Such samples were sealed and taken to the prisoner's house, and while they were in his possession the prisoner tampered with them by extracting

the contents of the bags, which he cleaned and replaced in the bags without breaking the seals, thereby producing very much better samples. The samples so altered were forwarded by the prisoner to the London Corn Trade Association, who, by the terms of the contract, were to appoint arbitrators in default of arbitrators being appointed by the parties should any question be in dispute, and who were also to elect a committee of appeal, if necessary, for the purpose of hearing and finally deciding any appeal against the award of the arbitrators. No arbitration, in fact, ever took place. *Held* (by the Lord Chief-Justice, Baron Pollock, and Justices Stephen, Charles, and Lawrance), that the indictment was good, and alleged an offence, although it did not allege that an arbitration took place, or that the samples were used as evidence; that the offence committed by the prisoner was not a mere private cheat, but was an attempt to mislead a tribunal of a judicial nature by the manufacture of false evidence; and that it was, therefore, not necessary that the evidence should have been, in fact, used in order to constitute the offence charged; and that inasmuch as the prisoner had forwarded the sample when altered to the Association in London, and had thereby put it out of his power to retract what he had done, he had done all that he could do to pervert the due course of law and justice, and was, therefore, rightly convicted upon the evidence of the offence with which he was charged.—Court for Crown Cases Reserved, 24 January.

CARRIAGE OF GOODS.—*Charter-party*—"Always afloat"—*Loading—Demurrage.*—By the terms of a charter-party, the steamship *C.* was to proceed to the charterer's loading berth in a dock, and there load "always afloat" a full and complete cargo. The *C.* having arrived in the berth, loaded a portion of her cargo. It was then found that, although she could take in the remainder of her cargo, remaining always afloat, she could not, when fully loaded, in the neap tides then existing, have passed over the dock sill for a week. She therefore left the dock and completed her loading outside. *Held* (by Sir James Hannen and Mr. Justice Butt), that inasmuch as she could load "always afloat" in the dock, she was not entitled to leave it in order to avoid being neaped.—*The Curfew*, High Ct., Probate, Divorce, and Admiralty Div., 24 January.

COMPANY.—*Alteration of Memorandum of Association—Companies (Memorandum of Association) Act 1890 (53 & 54 Vict. c. 62)—Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63).*—A petition was presented by a company, under the Companies Acts 1862 to 1890, asking for the consent of the Court to certain proposed alterations in, and additions to, the Memorandum of Association of the company resolved on by special resolutions. The company was registered in May 1888, with a nominal capital of £2,000,000, but it had not been brought out, nor had it carried on business. It had no creditors nor debenture-holders, and only seven shareholders, viz. the seven subscribers to the original Memorandum of Association, all of whom joined the company as co-petitioners. The com-

pany had no Articles of Association. The objects of the company, as contained in its Memorandum of Association, were those of an investment and loan company. It was proposed to add to these the objects of a guarantee and finance company, with increased borrowing powers. It was submitted that, by virtue of the Bankruptcy Acts 1869 and 1883, and of the Companies (Memorandum of Association) Act 1890, and the Companies (Winding-up) Act 1890, and the two General Orders made thereunder on 29th November 1890, the jurisdiction to make the order now asked for was in the judges of the Chancery Division to whom chambers were attached, or if not, then in the London Bankruptcy Court, now attached to the Queen's Bench Division. In the latter case, however, the proceedings could, under secs. 1 (7) and 3 (1) of the Companies (Winding-up) Act 1890, be retained by this Court, even if such proceedings were not properly commenced in this Court. The proposed alteration came within the objects allowed to be altered by the Companies (Memorandum of Association) Act of 1890. The evidence showed that the business of the company could be more conveniently carried on with less restricted borrowing powers, and that the proposal to give to the company the additional powers of a guarantee and finance company would enable the company to carry on business more efficiently, and attain its purpose by improved means, and also conveniently and advantageously combine other business with its original business. Every one who was properly interested was before the Court, and if the memorandum were not altered, the petitioners would, if they thought fit to dissolve and reconstruct the company (which was quite in their power), be put to an outlay of £2000 for stamp duty under the Customs and Inland Revenue Act 1880. *Held* (by Mr. Justice Chitty), that it was unnecessary to decide any question as to jurisdiction, and that the Court, under the circumstances, ought to sanction the proposed alterations; and that, although there had been no advertisements of the petition or application in chambers relating thereto, advertisements would, under the circumstances, be dispensed with.—*Re Empire Trust Limited*, High Ct., Ch. Div., 24 January.

LUNACY.—*Judgment creditors—Charging orders.*—Several judgments were obtained by creditors against a lunatic so found by inquisition, and charging orders were made in favour of the judgment creditors upon a sum of stock in Court to the credit of the lunatic. On the death of the lunatic, *Held* (by Lords Justices Lindley and Kay, sitting in Lunacy), that to the extent of the charging orders the fund did not belong to the estate of the lunatic, but to the creditors, who must therefore be paid, and the balance only paid over to the lunatic's legal personal representative.—*Re Leavesley*, High Ct., 26 January.

NECESSARIES.—*Foreign ship—Brokerage on charter-party—3 & 4 Vict. c. 65, sec. 6.*—By sec. 6 of 3 & 4 Vict. c. 65, it is enacted "that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . for necessities

supplied to any foreign ship and sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the . . . necessities were furnished in respect of which such claim is made." Whilst the foreign ship *M.* was at sea, the plaintiffs, who were shipbrokers, negotiated a charter-party. The plaintiffs not having been paid their brokerage on the charter, instituted an action *in rem* for necessities under 3 & 4 Vict. c. 65, sec. 6, and arrested the *M.* The defendants having moved to set aside the writ, on the ground that brokerage on a charter-party was not a necessary, *Held* (by Mr. Justice Butt), that as the charter-party was in respect of a subsequent voyage, the brokerage was not a necessary, and therefore the writ must be set aside. *Semble*, that even if the charter-party had been in respect of a voyage about to take place, broker's commission would not be necessary within the meaning of 3 & 4 Vict. c. 65.—*The Marianne*, High Ct., Probate, Divorce, and Admiralty Div., 27 January.

SHIP.—*Collision—Limitation of liability—British ship—Foreign Ship—Register—Tonnage—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sec. 19—Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), sec. 54.*—By sec. 19 of the Merchant Shipping Act 1854, "Every British ship must be registered in manner hereinafter mentioned . . . and no ship hereby required to be registered shall, unless registered, be recognised as a British ship." By sec. 54 of the Merchant Shipping Act Amendment Act 1862, "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity; that is to say, (1) Where any loss of life or personal injury is caused to any person being carried in such ship; (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; (3) Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat; (4) Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat; be answerable in damages in respect of loss of life or personal injury, either alone or together, with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage, such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room. In the case of any foreign ship, which has been or can be measured according to British law, the tonnage as ascertained by such

measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship." The steamship *B.* was found to blame for a collision with the steamship *C. Q.* The collision occurred on 18th February 1890. On 25th January, at which time the *B.* was registered as a Dutch ship, a bill of sale was executed, transferring the *B.* to her present owners, two British subjects; but, at the request of the vendees, the *B.* remained registered in Holland, and it was not until after the collision, viz. on 12th March 1890, that she was registered as a British ship. The owners of the *B.*, having instituted an action to limit their liability, the defendants denied that they were entitled to limit their liability, on the ground that the *B.*, although owned at the time of the collision by British subjects, was not registered as a British ship in compliance with the Merchant Shipping Acts. *Held* (by Mr. Justice Butt), that the *B.* was a Dutch ship, that the plaintiffs were entitled to limit their liability, and that its amount was to be based upon her British register.—*The Brinio*, High Ct., Probate, Divorce, and Admiralty Div., 27 January.

MASTER AND SERVANT.—*Deductions from wages*—*Truck Act 1831* (1 & 2 Will. IV. c. 37)—*Truck Act Amendment Act 1887* (50 & 51 Vict. c. 46)—*Employers and Workmen's Act 1875* (38 & 39 Vict. c. 90).—A railway goods guard had deducted from his wages by the railway company certain contributions towards the Sick and Funeral Allowance Fund. These contributions had been deducted from the wages of the plaintiff over a considerable number of years, at the commencement of which the plaintiff entered into an agreement with the railway company, agreeing to these deductions, after which from time to time he gets a paper showing him what has been deducted, and which he signs. On bringing his action in the County Court to recover these deductions, plaintiff claimed he was entitled to the whole amount as wages; and further, that by sec. 3 of the Truck Act (1 & 2 Will. IV. c. 37) it is not legal to deduct these amounts. That section provides that wages shall be paid in the current coin of the realm, the Act providing that employers shall be prevented making such deductions as were made in this case, and that plaintiff was "otherwise engaged in manual labour," according to sec. 2 of the Truck Amendment Act 1887, which provides that the principal Act, the Truck Act of 1831, shall extend to, and apply to, and include any workman as defined in sec. 19 in the Employers and Workmen's Act of 1875. The County Court judge nonsuited the plaintiff. The defendant company, in supporting the decision of the County Court judge against the plaintiff's appeal, contended that the plaintiff did not come within any of the definitions of the Truck Acts, as being "otherwise engaged in manual labour," and that if he did, the Acts did not apply, as the deductions made from his wages could not be said to be, or to be interpreted as payment of wages in goods. *Held* (by Baron Pollock and Mr. Justice Charles), that it appeared there was nothing in the company's rules which required plaintiff to do porter's work as part of

his duty, and the County Court judge was right in coming to the conclusion that plaintiff was not a person "otherwise engaged in manual labour." It was only persons engaged in manual labour who were brought within the Truck Acts, these Acts not applying to persons in the higher classes of employments. The plaintiff did not come within these Acts, so the question as to whether these deductions came within these Acts does not apply. The plaintiff's appeal dismissed.—*Hunt v. The Great Northern Railway Company*, High Ct., Q. B. Div., 28 January.

SLANDER.—*Imputation against chastity—Special damage—Unauthorised repetition—Liability.*—An action was brought for damages for slander. The slander alleged was an imputation on the chastity of the plaintiff, who was an unmarried woman. It was uttered to the plaintiff's mother, who repeated it to the plaintiff, who repeated it to G., to whom she was engaged to be married, and he broke off the engagement. There was no evidence to show that the defendant knew of the plaintiff's engagement, or intended the slander to be repeated. The jury found a verdict for the plaintiff. *Held* (by Lords Justices Lindley, Lopes, and Kay), that no special damage was shown, as the defendant was not liable for the unauthorised repetition of the slander, and that judgment should be entered for the defendant.—*Speight v. Gosnay*, Court of Appeal, 29 January.

TRUSTEE.—*Breach of trust—Unauthorised investment of trust funds—"Company incorporated by Act of Parliament."*—The plaintiff was a beneficiary under the will of one Ayres, who died in 1856. The defendants were the executors of the sole trustee of the will. In 1877 the trustee invested £2719, part of the trust fund, in the purchase of forty shares in a corporation called the London Assurance. In 1888 the shares were sold by his executors for £627 less than the amount originally paid for them. The will of Ayres authorised the investment of trust funds in (*inter alia*) "the stocks, shares, or securities of any company incorporated by Act of Parliament and paying a dividend." The company was constituted in the following manner: By the Act 6 Geo. I. c. 18 (a public general Act), which imposed the penalty of *præmunire* on persons misusing obsolete charters, the Crown was enabled to incorporate two companies for carrying on the business of marine insurance, with provisions in the charters which could not be inserted in a prerogative charter. One of the two companies incorporated in consequence of the Act was the London Assurance, whose charter was issued in June 1720, with the provisions authorised by the statute. In April 1721 a fire insurance company was incorporated by prerogative charter, under the name of the "London Assurance of Houses and Goods from Fire." The charter provided that the court of directors of the London Assurance should be the court of directors of the Fire Insurance Corporation. Various Acts of Parliament were passed from time to time recognising the two corporations; and in 1830 a private Act (11 Geo. IV. c. 74) was passed, incorporating a new corporation, called "The London Assurance Loan Company,"

composed of the two existing companies. In 1853 a private Act (16 Vict. c. 1), the London Assurance Consolidation Act 1853, was passed, which in effect amalgamated the three companies. It consolidated the stock of the companies, and gave the members of the fire companies the same privileges as the members of the London Assurance, and gave that corporation extended powers. On behalf of the plaintiff, it was urged that the London Assurance was incorporated by Royal charter and not by Act of Parliament, and was not, therefore, within the investment clause in the will. On behalf of the defendants, it was contended that the corporation was originally incorporated under and by virtue of an Act of Parliament, and that, even if it was not, the effect of the Act of 1853 was to reconstitute it as a new corporation. *Held* (by Lords Justices Lindley, Lopes, and Kay), that the company having been incorporated under the powers given by the Act 6 Geo. I. c. 18, which empowered the Crown to grant a charter to the company giving it powers which the Crown could not have conferred without that Act, it was a company incorporated by Act of Parliament within the meaning of the clause.—*Elve v. Boyton*, Court of Appeal, 29 January.

INFANT.—*Guardianship—Custody—Religious education.*—A Protestant man was married to a Roman Catholic woman, and previously to their marriage an agreement was executed providing that the children of the marriage should be brought up in the Roman Catholic faith. In March 1883 a daughter was born, who was baptized privately by a Roman Catholic priest, and afterwards publicly in a Roman Catholic church, the godfather and godmothers being also Roman Catholics. In March 1886 the father died intestate, at the house of his wife's cousin, M., a Protestant, where he was staying with his wife and child. The mother died in October 1889. M. had taken care of the infant, with the mother's consent, during nearly the whole of the time from the father's death till June 1890, when the infant was forcibly taken from her by C., the mother's brother, a Roman Catholic, and sent to America. The infant was subsequently brought back to England under *habeas corpus* proceedings which had been commenced against C. C. then applied to the Court to have himself appointed guardian of the infant, in conjunction with a Roman Catholic bishop, a Roman Catholic solicitor, and the lady superior of a religious home. The application was opposed by the respondents, the paternal uncle and M., Protestants, who proposed themselves as guardians. For the applicants it was contended that the father had abandoned his right to have his child brought up in his own religion, and had by his conduct indicated a wish that she should be brought up as a Roman Catholic, and that, even if M. should be allowed to have the custody of the infant, she ought to be directed to bring it up as a Roman Catholic. It appeared, however, that M. declined to accept the guardianship if the direction suggested by the applicants was imposed. *Held* (by Mr. Justice Chitty), that C. had by his conduct shown himself an unfit person to be entrusted with the guardian-

ship of the infant, and that the case of appointing the strangers whom he proposed as associates with him, in the office of guardianship, necessarily failed, unless the Court was constrained on religious grounds to have recourse to them; that, acting in accordance with the principles laid down in *Andrews v. Salt* (L. R. 8 Ch. App. 622), the Court was free to consult the best interests of the infant, and that it was most for her well-being in the future that she should be entrusted to the charity of the lady whose kindness she and her parents had already experienced; therefore, that the paternal uncle and M. ought to be appointed guardians of the infant, and the custody of the infant must be given to M., with liberty to bring her up as a Protestant.—*Re Violet Nevin, an infant*, High Ct., Ch. Div., 29 January.

ANNUITY.—*Will*—*Direction to purchase Government annuity out of proceeds of sale of land*—*Death of annuitant before completion of sale.*—A testatrix, who died in May 1890, by her will gave several annuities charged on real estate, including an annuity of £10 a year to M. R. for her life. Subject to the annuities, the testatrix devised her real estate to trustees upon trust for sale. By a codicil to her will, the testatrix declared that her trustees might purchase Government annuities for the annuitants to be in place of the annuities given by her will, the purchase-money to be a first charge upon the proceeds of sale of the estates charged, and the estates upon the purchases being made, to be respectively discharged. On the 7th August 1890 the estates charged with the annuity to M. R. were sold by the trustees, the 29th September 1890 being the day fixed for completion. The sale was duly completed on that day, and moneys were, pursuant to the conditions of sale, deposited at a bank for the purchase of annuities in place of those charged on the land sold; but such annuities were not actually purchased. M. R. died in September 1890, previously to the 21st of that month, and the question accordingly arose whether her estate was entitled to the value of her annuity, which had been duly paid down to her death. *Held* (by Mr. Justice Kekewich), that the claim to the value of the annuity failed by reason of M. R. having died before the actual completion of the sale, inasmuch as by the act of God the annuitant was not there to receive the money when it was paid to the trustees, and there was no enforceable trust and no vested right in her to receive the money.—*Re Mabbett; Pitman v. Holborow*, High Ct., Ch. Div., 31 January.

COMPANY.—*Prospectus*—*Misrepresentation*—*Application for shares by agent.*—The plaintiff alleged that he was induced by the prospectus of the defendant company to take shares therein, and he accordingly instructed his clerk M. to apply for 100 shares. M. applied for the shares in his own name, and they were allotted to M., who was duly registered as the holder of the shares. The money for the shares was found by the plaintiff. The shares were, after standing in his name for some five months, transferred to the plaintiff. The plaintiff subsequently discovered, as he alleged,

that he had been misled by misrepresentations in the prospectus, and brought an action for rescission of the contract to take shares, and rectification of the register of members by removing his name therefrom, and repayment of the money paid in respect of the shares. It was contended by the plaintiff that he was entitled to the relief which he claimed, notwithstanding that the contract to take the shares was not made in his own name, but in the name of his clerk M., inasmuch as M. was acting as his agent in making the application for shares. *Held* (by Mr. Justice Chitty), that the plaintiff was not entitled to be relieved from the shares on the ground of any misrepresentations in the prospectus, on the faith of which he himself did not apply for shares, it not being alleged that M. when he applied for the shares had communicated to the company the fact that he applied as agent for the plaintiff; that the original contract was made with M., through whom the plaintiff's title as transferee was derived; and it was not alleged that M. had been misled by the prospectus. — *Hyslop v. Morel Brothers, Cobbett & Son, Limited*, High Ct., Ch. Div., 4 February.

COPYRIGHT.—Infringement—Work of art produced abroad—Registration.—This was a motion to restrain defendant from infringing the plaintiff's copyright in a panorama of Jerusalem and the Crucifixion, and from exhibiting any picture which was a colourable imitation thereof. In 1885, P., an inhabitant of Munich, was engaged to paint a panorama of Jerusalem and the Crucifixion. He engaged K. and F., also Germans, to assist him, and the three went to the Holy Land to make pictures and take photographs. On their return they together painted eight pictures, one painting the architectural part of the subjects, one the landscape, and one the figures. From these pictures the plaintiff's panorama was afterwards painted on a much larger scale, and exhibited in Germany, and was now in Berlin. K. and F. afterwards went to Holland and the United States, and there painted other panoramas of Jerusalem and the Crucifixion, one of which had been brought over by the defendant and exhibited in London. It was proved that there was a copyright in the German panorama, and also that such copyright belonged, so far as necessary for the purpose of the present action, to the plaintiff. *Held* (by Mr. Justice Stirling), that the copyright in respect of which the plaintiff sued was in the panorama as a whole, and that if F. and K. had confined themselves to reproducing the parts which they respectively had painted they could not be interfered with; but, from the photographs produced, it appeared that, although there were some differences between the English and the German panoramas, the former was really only a colourable reproduction of the latter. There had been, therefore, an infringement of the copyright. The question thus arose how far it was necessary, in order to enable the plaintiff to sue, that the copyright should be registered in accordance with the Copyright Act of 1862 (25 & 26 Vict. c. 68). It was not really necessary to decide this point, because in the present case there had, in fact, been a regis-

tration which satisfied that Act. His lordship, however, expressed his opinion that it was essential, in order to enable a person to obtain the benefit of the International Copyright Act in regard to a work of art first produced in a foreign country, that it should be registered in this country in such a way as to satisfy the Acts of 1862. An interlocutory injunction was accordingly granted. — *Fishburn v. Hollingshead*, High Ct., Ch. Div., 4 February.

REVENUE.—*Income tax—Assessment of gasworks under Schedule A.*—The Corporation of Haverfordwest, by a private Act of Parliament in 1835, acquired the right of supplying themselves with gas, and they were empowered to sell the gas to private consumers, provided they first discharged their duty of lighting the streets, etc., of the borough. On the trade with private consumers they made considerable profit, and on the basis of that profit had been assessed to income tax. They now claimed to deduct from such profit the cost incurred in the lighting of the public streets. *Held* (by Baron Pollock and Mr. Justice Charles), that the deduction was wrongly allowed by the Commissioners, as the public lighting was not an expense necessarily incurred in the carrying out of their private trade, but only an expense necessary to enable them to enter on that trade.—*Dillon v. Corporation of Haverfordwest*, High Ct., Q. B. Div., 5 February.

INCOME TAX.—*The Income Tax Act 1853 (16 & 17 Vict. c. 34), sec. 51—Husband and wife employed at joint salary—Public office—Expenses necessarily incurred.*—This was an appeal from Commissioners of Income Tax. The respondent was the master of a national school, and his wife was the mistress. They were appointed at the same time at a joint salary of £150 a year, and had a house rent free of the yearly value of £8, the husband being also choirmaster at £10 a year. From the total income of £168 at which the husband was assessed he claimed to deduct £30 for the board and wages of a servant, as a necessary expense to enable him and his wife to perform the duties of their office. The Commissioners allowed the deduction. *Held* (by Baron Pollock and Mr. Justice Charles), that the assessment must be reinstated; that the salary was joint and derived from a public employment, and therefore taxable under Schedule E., and that the necessity of keeping a servant, though it might affect a person's acceptance of the office, was not an expense "wholly, exclusively, and necessarily" incurred in the performance of it.—*Bowers, Surveyor of Taxes, v. Harding*, High Ct., Q. B. Div., 5 February.

INSURANCE.—*Construction of policy—Liability in specified sum "for any one accident"*—Several persons injured by one vehicle being overturned—Separate "accident" to each.—By a policy of insurance the defendant company agreed to pay to the plaintiff company, so far as regarded claims for personal injury and damage to property made against the plaintiffs in respect of accidents caused by vehicles, or the motive power thereof while attached thereto, belonging to the

assured, and for which accidents the assured should be liable, the sum of £260 in respect of any one accident, but not exceeding in all the sum of £1500 in any one year. One of the vehicles of the assured was afterwards overturned, and thereby caused injuries to about forty persons, and the plaintiffs became liable to pay compensation and expenses to the amount of £833, 4s. 9d. in all. In a special case stated for the opinion of the Court, a question was raised whether the injury caused to each of the said persons constituted a separate accident within the meaning of the said policy. In the Divisional Court it was held by Mr. Justice Day (Mr. Justice Lawrance dissenting, but withdrawing his judgment), that the word "accident" in the policy referred to the overturning of the vehicle, and that the defendants were, therefore, only liable for £260. *Held* (by Master of the Rolls and Lords Justices Bowen and Fry), that each personal injury was a separate accident within the meaning of the policy.—*South Staffordshire Tramways Company v. Sickness and Accident Assurance Association*, Court of Appeal, 5 February.

Sheriff Court Reports.

SHERIFF COURT OF ORKNEY.

JAMES SPENCE AND OTHERS (SCARTH'S TRUSTEES), *Pursuers*,
v. ROBERT MORRISON, *Defender*.

Assessments—Arrears—Pounding and Sale—Taxes Management Act 1880—43 & 44 Vict. c. 19.—The amount realised under a pounding and sale was consigned in the hands of the Clerk of Court. Claims were lodged by the collectors of the Poor, School, County, and Roads and Bridges Assessments, claiming to be ranked and preferred on the consigned fund for these assessments for four years, including the year current, founding on section 88 of the Taxes Management Act 1880. *Held*, that they were only entitled to one year's assessments in preference to the pounding creditors.

Sheriff Armour has issued the following interlocutor in an action regarding the ranking for rates, which explains itself:—

"*Kirkwall, 24th January 1891.*—The Sheriff-Substitute, having considered the cause, Finds (1) that the sum realised under the pounding and sale amounts to £33, 3s. 2d., which has been consigned in the hands of the Clerk of Court; (2) that the expenses of executing said diligence as restricted amounts to £18, and that consequently the free balance left for division among the creditors

of the defender compearing and claiming in this process amounts to the sum of £15, 3s. 2d., which forms the fund *in medio*: Ranks and prefers the claimants Robert Miller and William Clark Liddle *primo loco* upon the fund *in medio*, to the extent of £2, 11s. and £1, 4s. respectively, these sums being in the one case the amount of the Poor Assessment and School Rate for the year to Martinmas 1891 (No. 19 of process); and in the other case the County Assessment and Road Assessment for the year ending Whitsunday 1891 (No. 27 of process): Ranks and prefers the pointing creditors, Scarth's Trustees, to the balance of the fund *in medio*, amounting to £11, 8s. 2d.: Grants warrant to the Clerk of Court to make payment in terms of the foregoing findings and ranking: Finds no expenses due to or by any of the parties, and decerns.

“S. B. ARMOUR.

“*Note.*—On the 1st November 1890, the defender Robert Morrison received a charge under an extract registered bond and disposition in security by him in favour of the pursuers, Scarth's Trustees. He allowed the charge to expire without making payment, and on 8th November his effects were pointed, the pointing being duly followed by a sale on 24th December. The proceeds of the sale having been consigned in the hands of the Clerk of Court on 10th January 1891, a claim (No. 19 of process) was lodged by Robert Miller for Poor Rates and School Rates for a period of four years, including the year now current, and amounting to £11, 16s. 4d. On the same date a claim was lodged by William Clark Liddle (No. 25 of process) for County Assessment and Road Assessment for a similar period, and amounting *in cumulo* to £5, 18s. 8d. At the hearing it was contended on behalf of these claimants, that they were entitled not only to payment out of the consigned fund of one year's rates, in priority to the pointing creditors, under the Taxes Management Act of 1880, but also that they were entitled to be ranked for the whole arrears due in preference to the pointing creditors. It appears to me that the rate collectors are certainly entitled to be preferred for one year's rates under section 88 of the Act just quoted (43 & 44 Vict. c. 19), and to that extent their claims have been sustained. The claim to a preferable ranking for the whole arrears, however, is in a different position, and, in my judgment, cannot be sustained. The statutory enactments regulating the question, and founded on by the claimants, are sec. 88 of 8 & 9 Vict. c. 81 (The Poor Law Amendment Act of 1845), and sec. 62 (5) of 52 & 53 Vict. c. 50 (The Local Government (Scotland) Act 1889). The former, which deals with Poor Rates and School Rates, enacts that ‘all assessments for the relief of the poor shall, in case of bankruptcy or insolvency, be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed.’ The latter, which applies to Country Rates and Road Rates, is practically in the same terms. Technically the defender Morrison is insolvent, no doubt, and it may be that were his estate in the hands of a

bankruptcy trustee for division among the creditors, the rate collectors would be entitled to a ranking for the full sum claimed in preference to such creditors as the pursuers. I do not think it necessary to offer any opinion upon that question, for it seems to me that the question raised in this competition is a different one altogether, and is simply this: Assuming the preference, are the rate collectors entitled to make it operative in this process? I am of opinion that they are not. If they were, they would carry off the whole fund realised by the pursuer's diligence, which certainly has the appearance of being somewhat of a hardship. Section 8 of the Taxes Management Act 1880 specially guards against this hardship, by enacting that the rate collector can only demand payment of one year's rates from the creditor whose diligence he interrupts. Now, the rate collectors have no *locus standi* in this process, except under the foregoing enactment. Apart from its provisions, they are merely ordinary creditors *quoad* this process and not having liquid debts, or having themselves poinded, they cannot compete with the pursuers, or deprive them of the benefit of their diligence. The rate collectors have their remedy if they like to use it. They may make the defender bankrupt, and lodge their claims with the trustee for arrears. Were they to take this course, it might turn out that the defender's funds are sufficient to pay all creditors in full, or, if there be a deficiency, the trustee might possibly rank them preferably for their claims. But I am certainly of opinion that this process cannot be regarded as equivalent to a process for winding up a bankrupt's estate such as *cessio* or sequestration, and I have no hesitation in refusing the claim for arrears. It was not argued that the rate collectors were entitled to be ranked *pari passu* for the arrears of rates along with the poinding creditors under sec. 12 of the Bankruptcy Act of 1856. I suppose it is admitted that the debt is not a liquid one. At all events, I hold it to be so. Had the rate collectors constituted their claim by a small debt action, or had they used diligence against the defender on their own behalf, they would, of course, have been entitled to a *pari passu* ranking for the arrears.

"S. B. A."

Act. Macrae and Robertson—*Alt.* Buchanan and Liddle.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The Clitheroe Abduction Case.—The English Court of Appeal gave their decision on the question raised in this case on 19th March. It would not be so accurate to state that the doctrine then laid down was novel or at all at variance with modern ideas on the matter in hand, as to remark that the enunciation of that doctrine as the law of the land came as a surprise to many. The prevalent feelings and opinions on such matters have naturally a tendency to be rather in advance of the settled law; and there are members of the community—perhaps chiefly those who are most in advance in this way—who are startled when practical effect is given to their own ideas and contentions. A Mr. Jackson had urged his wife to live with him, and she had resolutely refused. Having obtained a decree for the restitution of his conjugal rights, he seized her by force, and kept her locked up in his house. There was no ill-treatment; only this rigorous imprisonment. Mr. Justice Cave held that in so shutting up his wife by force, Jackson was within his rights as a husband. From this decision the Court of Appeal differed. The judges pointed out that imprisonment as a means of enforcing the restitution of conjugal rights has been abolished by Act of Parliament. The Lord Chancellor laid it down that the *dicta* of the old law books as to the husband's right of chastising his wife (*acriter verberare*)

must be held to be obsolete. We may remark that the police court has thousands of times mercifully so treated these *dicta* by meting out due punishment to chastising husbands. So, according to his lordship, are the *dicta* concerning the husband's right to keep his wife detained against her will, though this would revive if she were caught eloping with another man. A well-conducted wife may thus legally quit her husband at her own discretion. This clear statement of the law has an important aspect. It points to something like an anomaly. Legally, there may be separation at will, but there cannot legally be divorce at will. We have, however, a corresponding anomaly in this, that there may be separation for cruelty, but not divorce for cruelty.

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"Renewal" of Licences.—The case of *Sharpe v. Wakefield*, decided in the House of Lords last month, raised an important, though not a difficult, point in licensing law. The origin of the somewhat protracted action was an application for the "renewal" of a licence for the Low Bridge Inn, Kentmere, Westmoreland. The Licensing Justices refused to renew the licence, on the ground "of the remoteness of the house for the purposes of police supervision, and the character and necessities of the locality and neighbourhood." On appeal to Quarter Sessions, the Justices affirmed this decision; but a case was stated for the Queen's Bench Division. Mr. Justice Field and Mr. Justice Wills upheld the judgment of the Justices, holding that they had a discretion to act as they had done. This view was again sustained by the Court of Appeal; and, finally, the House of Lords (consisting of the Lord Chancellor, and Lords Bramwell, Herschell, Macnaghten, and Hannen) unanimously affirmed the judgment of the Court below. As the Lord Chancellor pointed out, by the express language of the statute the original granting of a licence is within the discretion of the magistrates, who for that purpose are entitled to take into consideration the circumstances of the neighbourhood, not only with regard to population, but also with regard to the means of inspection by the proper authorities; and there is no sense or reason in making the

consideration of these elements irrelevant when a licence is to be "renewed." The word "renewal" is not mentioned in the statute. Each licence is for one year only.

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Retirement by Special Request.—The soul of the London *Law Times* is perturbed; and many a London daily has markedly shared the uneasiness. The first-named journal has said, and continues to say, many things "under a grave sense of public duty." It is plain to all men that it will not be happy until a certain resignation has been tendered, accepted, and recorded. Precedents have been ransacked, and use has been made of opinions of the press; but still the *Law Times* is not happy. A member of Parliament has summoned up courage to ask, in his place in the House of Commons, a plain question. Yet the alleged evil is not redressed. It is an impressive and an improving spectacle to witness a man or a magazine steeling itself to do a distasteful act "under a grave sense of public duty;" and when he, or it, keeps pegging away day after day, and column after column, at the same unpalatable task, one cannot but feel morally the better for being favoured to behold so much militant virtue.

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Lynch Law in Louisiana.—New Orleans has been the scene of a startling example of Lynch law. The circumstances present three peculiar features. The victims numbered no fewer than eleven; the miscarriage of justice which the Lynchers desired to correct was clear and undoubted; and the administrators of this summary punishment were not themselves obscure or ordinarily lawless men, but the leading citizens of the place, acting with the connivance of the mayor and the heads of the militia. These last are novel features in the operation of this violent mode of redress. It is impossible not to feel some sympathy with the Lynchers in this case, strongly though we condemn their conduct. New Orleans has its share of the huge Italian population which has found its way into the States; and the secret society known as the Mafia so flourishes in the town, that

during the last two years forty murders have been credited to its activity. The chief of the police had arrested certain of the leaders of this organisation, with the view of suppressing it, when he was himself assassinated by its members. Nine Italians were arrested and brought to trial for his murder. There was abundant evidence against them; but, to the astonishment and indignation of every one, the jury acquitted six of the prisoners, and disagreed as to the guilt of the other three! The Mafia, it is said, had succeeded in intimidating or bribing the foreman and half of the jury. The Americans of the town were exasperated at the verdict. Under a well-known and respected lawyer, they broke into the prison and massacred all the accused, along with two Italians who were confined on a different charge. This is crude, and it is primitive. It is to be deplored and condemned. But it is not without a foundation of reason and justice. The people have committed the administration of justice to a certain machinery; so long as that machinery works without flagrant injustice, it will be left to do the work; but when it utterly breaks down, or goes in the teeth of what is right according to the rough-and-ready ideas of the Americans, the people will resume the function of dealing out punishment direct. The ultimate sanction is brought in. That is the American method. The Briton, when he thinks the ordinary tribunals have failed, writes to the *Times*, or gets up a monster petition to the Home Secretary, or asks a question in the Houses of Parliament.

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Our Obituary.—This month we have a peculiarly heavy obituary list to record. Edinburgh will mark great gaps in her legal circles through the death of Mr. T. G. Murray, W.S., and Mr. Forbes of Medwyn, the oldest surviving member of the Faculty of Advocates. The west of Scotland has lost an eminent lawyer in Dr. M'Grigor. In central Scotland a well-known and respected figure has been removed by the death of Dr. Patrick Stirling. Aberdeen, Dundee, and Duns have also suffered the loss of leading members of the legal profession.

Special Articles.

EXPENSES IN THE VALUATION APPEAL COURT.

[The following "Memorandum as to whether expenses may be allowed by the judges in the Valuation Appeal Court," was left by the late Lord Fraser in his repositories, and will be read with interest. The MS. is dated 17th October 1883. The foot-note is in the handwriting of the late Lord Lee.]

The statutes under which the Valuation Appeal Court act are,—

- 17 & 18 Vict. c. 91.
- 20 & 21 Vict. c. 58.
- 30 & 31 Vict. c. 80, sec. 8.
- 42 & 43 Vict. c. 42.

The first of these statutes, being the Valuation Act of 1854, in section 9, allows persons whose names are entered in the valuation roll to appeal against the assessor's valuation, to the Commissioners of Supply or Magistrates of the burgh, according as the lands shall be in a county or in a burgh. No provision is made by this Act for an opinion of a superior Court, except as regards railways and canals, who are entitled, under section 24, to appeal to the Lord Ordinary on the Bills under that section.

The second Act, 20 & 21 Vict. c. 58, authorises the persons whose property is to be valued (sec. 2) to demand a case against the decision of the Commissioners of Supply or the Magistrates, "and to transmit such case to the Commissioners of Inland Revenue, to the end that the same may be submitted to the Senior Lord Ordinary and the Lord Ordinary officiating in Exchequer Causes in the Court of Session, for their opinion thereon; and such judges to whom such case may be submitted shall, with all convenient speed, give and subscribe their opinion thereon, and according to such opinion the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed." The way in which this enactment is worked out is as follows. The case

is sent to the office of the Inland Revenue in Edinburgh. It will be observed that nothing is said as to expenses. On the one hand, there is no *express* prohibition against granting expenses (as in the case of the public prosecutor under the Summary Procedure Act, sec. 22), nor is there any *express* authority to award expenses.

The third statute, 30 & 31 Vict. c. 80, sec. 8, enacts that the judges to whom the case should be referred, "instead of being the Senior Lord Ordinary and the Lord Ordinary officiating in Exchequer Causes in the Court of Session, shall be any two judges in the said Court, who shall be named for that purpose from time to time by Act of Sederunt of the said Court; provided always, that any valuation which shall have been confirmed or altered in conformity with the opinion of said judges shall thereafter be final, and not subject to review in any manner of way." It is under this section that the present Valuation Judges are nominated.

The fourth statute above referred to, 42 & 43 Vict. c. 42, enacts in section 6 that any person interested may complain that any particular set forth in the valuation roll (other than the yearly rent or value) has been set forth erroneously therein. This has reference to particulars required by the Election Statutes to be set forth in the valuation roll, such as the amount of feu-duty. It has nothing to do with valuation. But section 7 authorises persons entitled to appeal against valuations,—as also the assessor,—to demand a case from the Commissioners of Supply or the Magistrates, setting forth the facts proved for the opinion of the two judges of the Court of Session; and such judges to whom such case may be submitted shall "give and subscribe their opinion thereon, and according to such opinion the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed. The cases under this section, and also under the recited Acts, may be disposed of by the judges in time of session or vacation, and in Court or at Chambers, and after hearing parties or not, at their discretion." The 8th and 9th sections contain further directions as to the taking of evidence and the recording of the arguments of parties, but nothing is said as to expenses to be awarded against the person demanding the case or in his favour.

The question now is, therefore, whether the Appeal Court can award expenses ?

Reference on this point is made to the following cases :—

1. *Ledgerwood v. M'Kenna*, 18th December 1868, 7 Macp. 261, per Lords Cowan and Kinloch.
2. *Walker v. Bathgate*, 2 Couper 469, per Lord Justice-Clerk Moncreiff.
3. *Ross v. Stirling*, 1 Couper 341, per Lord Deas, and per Lord Justice-General Inglis, 343.
4. *Nimmo v. Clark*, 10 Macp. 482, per Lord Justice-Clerk Moncreiff.
5. *The Queen v. Beattie*, 5 Macp. 191.* The observation in this case is a very important one. I forget which judge made it, but the point was not argued to the Court. If the ratio assigned in the report be sound, then the question submitted in this memorandum would be answered. But, query, is it sound ? A case submitted for the opinion of a superior Court is just an appeal, and nothing else ; and if the party fails in maintaining his case, why should the Court who has to pronounce an opinion upon it not be entitled to award expenses ? If that matter be inherent in every Court of law (as is said to be law by some of the judges in the above cases)—whether the Court pronounces judgment in the shape of review, or by sustaining a complaint, or affirming an appeal, or giving an opinion on a case—then the absence of express authority in the Valuation Acts will not prevent them awarding expenses.

P. F.

LIMITED LIABILITY COMPANIES AND BANKRUPT SHAREHOLDERS.

THE rights and duties of companies incorporated under the Companies Acts, in reference to members sequestrated or adjudicated in bankruptcy, raise some nice and delicate

* The decision in this case was agreement, the power to give expenses.

questions of law, which are far from being conclusively settled by authority in the Scotch or English Courts; and as the difficulties, which the present unsettled state of the law creates, are of an eminently practical character, it is of interest to practitioners, as well as to others more immediately interested in the management of companies, that the subject should receive careful consideration. The difficulties presented by sequestration or adjudication in bankruptcy of shareholders in joint-stock or limited liability concerns, become acute in considering the effect of the discharge of bankrupt members with or without reinvestiture in their estates. But a preliminary point is raised before attempting to solve the exact position of the discharged bankrupt shareholder, and it is this: Is it the duty of companies, upon the bankruptcy of members, to claim in the sequestration proceedings for the contingent value of unpaid and uncalled-up capital, when such companies may be in a prosperous condition and with no immediate prospect of going into liquidation? This raises a discussion new and interesting to the profession in Scotland. Certainly there is no practice in Scotland, so far as we are aware, in support of such claims being made in sequestrations, and yet we hope to show that it is the legal duty of public companies to claim for a ranking whenever they desire to prevent all future loss upon the liabilities of such members—assets of the companies—as are discharged under the Bankruptcy Statutes.

Of late, this subject has been receiving attention in England, and it may be well to submit the position of the matter according to the most authoritative light in which it there appears to be viewed. Where a member becomes bankrupt with a liability for arrears of calls in a company, not being wound up, it has all along been clear that the company could claim a ranking for the amount of these arrears. The debt is fixed and ascertained. But their right to rank, and the effect of their omission to do so, in reference to subscribed capital uncalled on the shares of bankrupt members, many years ago gave rise in England to great diversity of opinion. The situation was still further surrounded with difficulty when the company went into liquidation after the discharge in bankruptcy of a shareholder, who

still remained as a member of the company with respect to calls in the winding-up, and subsequent to his discharge. Was such a bankrupt shareholder liable in payment of these calls? It was even doubtful how far a company in liquidation could prove in the bankruptcy of members for the value of their contingent liability to calls subsequent to the date of their adjudication in bankruptcy, but which might, or might not, be necessary according to the particular circumstances of the company in liquidation. The cases under the early English Bankruptcy Acts were inconsistent with each other, and the removal of this conflict of authority was the object of section 75 of the Companies Act 1862, to the effect that—

“The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty [*i.e. ex contractu*]) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability; *and it shall be lawful, in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls as well as calls already made.*”

This section, however, obviously refers to the bankruptcy of members occurring immediately prior to, concurrently with, or subsequently to the commencement of the liquidation proceedings of the company in which they are shareholders. So, as pointed out by Lord Justice Lindley, this section gave rise to other difficulties, such as the precise date at which the liability of members for calls commenced, and as to the right of proving for calls made in winding-ups, according as these were prior or subsequent to the award of bankruptcy. But the distinctions made by judicial decision in reference to this section are stated by Lindley to have been swept away by the English Bankruptcy Act of 1869, now superseded by the Act of 1883, which is, relative to this matter, in substantially identical terms. The 37th section of the Act of 1883 has an all-important bearing, and is as follows:—

“37. (1) Demands in the nature of unliquidated damages

arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy.

"(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

"(6) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

"(7) If, in the opinion of the Court, the value of the debt or liability *is capable of being fairly estimated*, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and *the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy*.

"(8) 'Liability' shall for the purposes of this Act include . . . any obligation, or possibility of an obligation, to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."

Section 30, after stating, in sub-section 1, that the order of the bankrupt's discharge shall not be available against the Crown, unless consenting, nor against any indebtedness tainted by his fraud, proceeds,—

"(2) An order of discharge shall release the bankrupt from

all other debts provable in bankruptcy;" and by subsection 3, the order may be pleaded in respect of any debt from which he has been so released on the ground that the "cause of action" occurred before his discharge.

Now, the *crux* which limited liability companies have had in considering their position with regard to bankrupt shareholders, has always turned upon the possibility of the estimation of the bankrupt indebtedness for the uncalled liability upon the shares. How can this possibly be done, or what is the practical utility of estimating such liability, when the creditor-company happens to be at the time in a sound financial condition? The early English authorities arrived at the conclusion that such debts were not capable of fair estimation, and so were not provable in bankruptcy. For such a position there was much to be said; but with the clear definitions of the nature of a member's liability contained in the 16th section of the Companies Act 1862, enacting that "all monies payable by any member to the company in pursuance of the conditions and regulations of the company . . . shall be deemed to be a debt due from such member to the company, and in England and Ireland to be of the nature of a specialty debt," and of provable debts in the 37th section of the Bankruptcy Act of 1883, as well as in the corresponding section of the preceding Act, the tendency of judicial decision in England has of late years been to hold that the uncalled-up liability upon bankrupt members' shares is "capable of being fairly estimated," and so provable in bankruptcy. In view of this tendency, should the company allow the debtor to obtain his discharge without claiming in his bankruptcy, the company, in the event of subsequent insolvency, may find itself in an awkward predicament; for the discharged bankrupt, assuming the retention of his name on the list of shareholders as the holder of shares standing in his name at the date of his adjudication in bankruptcy, may ultimately be held to be wrongly placed on the list of contributories in the supervening liquidation of the company. This is a somewhat novel result. It is natural to suppose that the beneficial enjoyment had by the bankrupt from his shareholding after his discharge and reinvestiture in his assets should render him liable to calls made subsequent to

his discharge. But, on a consideration of the authorities, this result does not seem to be inequitable.

The judgment of Vice-Chancellor Bacon in *In re East India Cotton Agency*, 1876, 3 Ch. Div. 264, while an authority against the proof of the class of debts under consideration, is of material value in the solution of the question. The East India Cotton Agency was an English company. One of its shareholders, Furdoonjee, was adjudicated a bankrupt by the High Court of Bombay. In his state of affairs, he entered his holding of 100 shares in the company, and noted them as subject to a possible liability. Three months previous to the date of his Indian discharge in bankruptcy, the company had filed a liquidation petition in the English Courts. Furdoonjee was put on the list of contributories. By implication, it appears from the report of this case that the English company had notice of the Indian shareholder's discharge in bankruptcy, otherwise his discharge from the High Court of Bombay might not have been effectually pleaded as warranting the removal of his name from the list of contributories. The liquidator's answer to the discharge was that he was unable to prove for such a debt. Furdoonjee replied that the Indian Courts held such indebtedness provable, and that therefore his discharge excluded the liquidator's claim. The learned Vice-Chancellor was of opinion that there was no *constat* that there would ever have been a call in the circumstances of the case, and he could not see how such a contingent liability could be assessed at the time when the shareholder's bankruptcy commenced. In another view, this judgment, by the way, seems liable to exception, for it ignored the international effect of the bankrupt's Indian discharge against creditors with notice of his judicial insolvency.

The next and only subsequent case, so far as reported, entirely upsets the authority of Furdoonjee's case, *In re East India Cotton Agency*. The case is that of *In re Mercantile Mutual Marine Insurance Association*, 1883, 25 Ch. Div. 415. This association was one limited by guarantee; and by the fifth clause of the company's articles there was an undertaking on the part of members to contribute, in the event of the company being wound up during their membership,

within a year thereafter, a certain sum to meet the company's liabilities and costs, and charges attendant upon liquidation. On 15th July 1880, Jenkins, the member in this case, filed his petition in bankruptcy, under which his affairs were afterwards wound up by arrangement. At the date of his petition he was in arrear to the association for a call made 1st July 1880, in respect of which the association drew a dividend; but although the question was very sharply brought before them by this feature in Jenkins' insolvency, they failed to claim in respect of the uncalled-up portion of his guarantee. In the end of the same year, 1880, the association itself went into liquidation, and the liquidator placed Jenkins upon the list of contributories as liable for a sum of £343 in respect of calls accruing due upon liabilities of the association subsequent to 1st July 1880, and exclusive of the previous claim made in his bankruptcy. Upon the liquidator issuing a summons for payment, Jenkins pleaded his discharge in bankruptcy, and founded upon the fact that, while the winding-up of the association was proceeding, his own bankruptcy process was still *in esse*, so that the liquidator, if he had been so advised, might have put in an additional claim to rank for the £343 prior to the termination of the bankruptcy and release of the trustee. This was no doubt a specialty in the case, and must be kept in view in dealing with it. The main answer for the liquidator to the contention of Jenkins was, again, that it was impossible for him to put in such a claim, as he could not have proved the extent of the liability prior to the debtor's discharge, which was at that time "incapable of being fairly estimated," and he relied on Furdoonjee's case. It was admitted in the argument that there was no distinction in England between liquidation by arrangement—or, as we would say, a composition contract—and bankruptcy or sequestration. Mr. Justice Chitty decided the case. His lordship was satisfied that Jenkins was a "contributory" in the sense of the 75th section of the Companies Act of 1862, although this view is at variance with that of Lindley. Upon the critical part of the case, as to whether the debt was provable, his opinion is very instructive. Apart from authority, he saw little difficulty in the way of the liquidator estimating such a debt, where, as in the case, the bankruptcy

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proceedings of the debtor were concurrent with the liquidation of the creditor-company. For, as he stated, it is the constant practice, if not also the invariable initial duty of a liquidator, to survey the position of the company, and then to resolve upon the call or calls necessary to meet its obligations. In Jenkins' case, as the circumstances also warranted, his lordship held as matter of fact that the liquidator, as an accountant, could have had no possible difficulty in making an estimate of Jenkins' liability, and lodging a claim with his trustee accordingly. But as Vice-Chancellor Bacon had decided in Furdoonjee's case that such claims were incapable of proper estimation, Mr. Justice Chitty practically reviewed his judgment. He distinguished Furdoonjee's case from that of Jenkins' by its reference to an Indian insolvency, to which no such section as 37 of the Bankruptcy Act of 1883 applied, but at the same time he disowned the views of the learned Vice-Chancellor in regard to the impossibility of putting a value on such claims, more especially as the Court of Appeal had frequently dealt with contingent claims of much greater difficulty; and so, not only on the particular facts of Jenkins' case, but also on principle, Mr. Justice Chitty held that the liability to pay calls is a debtor liability "capable of being fairly estimated." It is true, as the rubric of the case sets out, that Mr. Justice Chitty restricts his judgment to the particular case before him, and that is, in circumstances where the bankruptcy proceedings of the debtor commence prior to, and are pending at, the winding-up of the company. But is his opinion capable of more extended application? So we think. We are supported in this view by Lindley, for in the 8th edition of his work on Company Law, p. 556, and under reference to this judgment of Mr. Justice Chitty, he says: "Under this Act [the Bankruptcy Act of 1883], when a shareholder becomes bankrupt, all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well as when the company is being wound up *as when it is not*;" and therefore, p. 557, "that inasmuch as under sec. 37 all calls due and to become due can be proved, the bankrupt when discharged will be free from liability in respect of the shares;" and as a corollary he farther argues, n. 815, that "a bankrupt member of a company being,

wound up under the Companies Act 1862, who has obtained his order of discharge . . . under the Bankruptcy Act 1883, is not a contributory either as a present or as a past member." Such seems to be a sound construction of the English Bankruptcy Act, from which it follows that companies have no remedy, in the event of their ultimate liquidation, against their failure to claim timeously in the bankruptcy proceedings of their shareholders prior to discharge. Of course, this law can only apply where the trustee of the bankrupt does not dispose of the shares. In the event of their transference to a purchaser accepted by the company in place of the bankrupt, the company will, as they can only, look to the registered transferee in all subsequent questions of liability upon the holding transferred. Yet the anomalous result happens, where the trustee disclaims, or does not deal with, the shares, that the bankrupt may, after discharge, draw dividends upon his holding, and at the same time be free from all liability in the event of the company going into liquidation. Mr. Justice Blackburn, in *Marten's Patent Anchor Company*, L. R. 3 Q. B. 311, alluding to this anomaly, described it as "a monstrous injustice that, when a man remains a shareholder, the assignees [his trustee in Scotland] not taking his shares, he should yet be allowed to get rid of his liability to pay calls on the ground that he had been a bankrupt several years before." But later opinions do not support the supposed want of equity in this, no doubt, somewhat singular result. It is to be observed, however, that Mr. Buckley would seem to approve of Furdoojee's case, as he gives a reluctant concurrence to the judgment of Mr. Justice Chitty in the last two editions of his authoritative guide on company practice.

But the matter must also be considered in the light of Scotch law, and with special reference to our own Bankruptcy Act of 1856. Of Scotch decision, however, the dearth is absolute. It seems, and surprisingly so, to have hitherto been taken as granted, and beyond question, that companies could not claim in the sequestrations of their bankrupt shareholders unless the companies were themselves in liquidation; and further, that discharge in bankruptcy did not free such shareholders from liability for calls becoming due subsequent to their bankruptcy, and in respect of shares

they continued to hold. This appears to be the drift of the somewhat bare statements made in the works of Professor Goudy and Mr. Murdoch; and curiously their views in this direction are to some extent borne out by the English case of *M'Ewen*, 1871, L. R. 6 Ch. 552, referred to by Mr. Murdoch at page 444 of his last edition. The bankrupt member in this case had been sequestrated in Scotland, but the company was English. Substantively this case bears to be an authority to the effect that the discharge of the bankrupt will free him from liability when his bankruptcy is subsequent to the liquidation of the company, although the list of contributories is not settled until after his discharge. The rubric of this case further states, that "the same doctrine is applicable to a Scotch sequestration as to an English bankrupt," *i.e.* in regard to the effects of discharge. But certain concessions *arguendo* in that case must be traversed. It was assumed that the liability of a member cannot be estimated when the company is a going concern. This has already been shown to be at variance with later English opinion. Another assumption was, as stated by Mellish, L. J., that "under the provisions of the Scotch Bankrupt Law no such proof could have been made." Professor Goudy certainly might be held as giving countenance to this assumption when he writes, page 398, "Thus debts or obligations, of which it may be said that the contingency is a latent possibility, are not affected by discharge." In our view, there is no foundation for the admission given to the English Court in *M'Ewen's* case. Keeping in mind the character of the liability of a shareholder as defined by the Companies Act 1862, there appears to be no difficulty in the way of companies, albeit they are going concerns, ranking in the sequestrations of their bankrupt shareholders upon the estimated value of their claims in respect of monies uncalled up on the shareholdings. True, the liability is only contingent, so much so that it might seem ridiculous to any flourishing company to contemplate, by claiming a ranking, the idea of its insolvent dissolution. *Per se*, however, such an attitude would not excuse or absolve the company so refraining from the consequences of its omission in our view of the law. The 53rd section of the Bankruptcy Act of 1856 expressly provides for the valuation by the

Sheriff of the claims of creditors whose debts depend upon contingencies. The House of Lords, as pointed out by Mr. Justice Chitty, has sanctioned the estimation of claims, subject to contingencies, with much greater difficulties in the way than present themselves in this discussion, and for special illustration the valuation of an annuity, *dum casta*, is cited. The 53rd section of our own Act is no doubt expressed in very general terms, but it is for that very reason as comprehensive as the 37th section of the English Act, which we have seen to be somewhat elaborate in construction. Then, if such claims are valuable at all, it is certainly much more to the purpose, and after all business-like, for companies to give the go-by to sentimental considerations, and so have their claims submitted for reasonable judicial valuation, than to run the risk of allowing bankrupt members to hold their shares and enjoy dividends, for years it may be, after their discharge, prior to company reverses, at one time, apart from the propriety of claiming, not unnaturally altogether discounted. Of course the practical commentary in the case of prosperous companies is obvious, for they will generally be saved from considering the necessity of ranking, by the trustee in bankruptcy making, subject, as is usually the case, to their approval by registration of the transfer, an advantageous sale of the bankrupt member's shares. But with companies whose affairs, as not unfrequently happens, are at a low ebb, and with shares probably unsaleable in the stock market, it becomes their imperative duty, in the interest of the whole body of their shareholders, to claim in the sequestrations of bankrupt members on the valued amount of the open liability. Hitherto, as we set out, such a duty has been wholly lost sight of in Scotland. The matter has not, indeed, come up for judicial decision, but we do not hesitate to anticipate that the Scotch Courts, with the direction of English opinion before them, may affirm the view that the liability in question is as provable in Scotland as it is found to be in England, and that under and in respect of the terms of our leading Bankruptcy Statute, *non obstante* M'Ewen's case. The only Scotch case with any bearing upon the subject is the recent one of *Taylor v. Union Heritable Securities Company Limited*, 1889, 16 R. 711, and, while

not raising the question purely, it is of suggestive importance. Taylor, whose shares were only partially paid up, was discharged from bankruptcy in 1885 on payment of a composition, and was reinvested in his estates by the force of the statutory terms of his discharge. The company did not claim in his sequestration, although it appears from the report of the case that it was in a depressed condition at the time of the sequestration. No dividends seem to have been paid to Taylor from 1885 to 1887, when he requested the company for the first time to remove his name from the list of shareholders. Subsequent to this request, the company made a call upon him in respect of his shares. On the company's continued declinature to remove his name, Taylor presented a petition to the First Division of the Court of Session for its removal, upon the ground that the amount unpaid on his shares was a debt for which he was liable at the date of his sequestration, and of which he had been freed by his discharge in bankruptcy. The Court refused the prayer of this petition in respect of its incompetency under the Companies Acts, which provide only three ways—transfer, surrender, and forfeiture—by which a shareholder's name can be removed from the list of shareholders. The Court in Taylor's case, therefore, only dealt with the technical question of the removal of his name, and expressly abstained from pronouncing judgment upon the question of a discharged bankrupt shareholder's liability. The Lord President said that this question raised "very considerable difficulties," which Lord Shand termed as "very nice and delicate" in two of its aspects, (1) whether there was a limit to the liability in respect of the sequestration and subsequent discharge, and (2) whether the shareholder was bound to claim the benefit of that limitation timeously. But, beyond the notice of these difficulties, no judicial assistance is obtained from Taylor's case. Lord Shand, contrary to English law and practice, apparently was inclined to think that the duty, if any, was upon the shareholder to seek exemption from liability; but it is worthy of notice that none of the English cases to which we have referred were cited to the Court in Taylor's case. The report of this case creates the further impression that the fact of reinvestiture of the

bankrupt in his estates, as the result of his discharge on composition, might bar his claim to exemption from liability for future calls. But this is just a factor which, as we have shown, is of no materiality, according to the view taken of the matter in England, and as there is no reason why the bankruptcy practice of the United Kingdom should be at variance in this particular branch, the same view will doubtless be taken by the Scotch Courts whenever the question is brought purely before them. Taking it as beyond doubt, and that whether the company is or is not a going concern, that the value of the liability in such cases is assessable, it remains for us to submit that the effect of the deliverance discharging the bankrupt, on or without composition, is absolute, precluding the creditor-company from afterwards enforcing their claim against the discharged bankrupt member. The only difference between a discharge on composition and one without composition is, that in the former the bankrupt is reinvested in his estates, whereas in the latter these continue available to the general creditors. The deliverance discharges the bankrupt "of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration;" in the case of a composition it reinvests the bankrupt in his estate, "reserving," in that event, "always the claims of the creditors for the said composition against him and the cautioner;" and such discharge operates "as a complete discharge and acquittance to the bankrupt in terms thereof" of binding validity in all parts of the British dominions. Such are the provisions of the 140th and 147th sections of the Bankruptcy Act 1856.

It has thus been our aim and intention to show that in all cases where companies are interested in the bankruptcy proceedings of any of their shareholders, it is their interest and their duty to claim and draw a dividend in sequestrations where the trustee and the bankrupt member does not dispose of the shares, and especially where the bankrupt procures his discharge on composition. Otherwise, notwithstanding re-investiture and subsequent enjoyment of rights as shareholders, such companies run the serious consequence, from neglect, of thrusting upon the solvent shareholders the whole burden of the liability for which members were liable at one

time, but from which they obtained a full discharge in their sequestrations. It was said for the company in Taylor's case, as of some moment, that the company received no notice of his sequestration. But bankruptcy is a public fact, and no creditor by the want of individual notice is excused in his omission to see to his dividend. Again, reinvestiture does militate against the bankrupt's claim to exemption, so far as the creditors are concerned, because they are protected by the statutory reservation of their claims for a composition on their debts; and to this composition, provided they timeously claim, the companies, like any other creditors, seem restricted.

The question is an important one in company law, well meriting the attention of all interested in the management of companies, and of their legal advisers, and the present discussion may not be without value in emphasising its importance.

G. W. W.

WEELLIAM KLINK ; OR THE EVILS OF LITIGATION.

A CAUTION TO COCK-LAIRDS.

A DECENT man was Weelliam Klink,
The Laird o' Whistlebare;
He ne'er was seen the waur o' drink,
He ne'er was heard to swear.

He was a man o' mickle sense,
Wha lo'ed a peacefu' life;
An' as a nait'ral consequence,
He didna tak' a wife.

He gaed on Sawbath to the kirk,
To lift his v'ice on high
In praise o' Bawshan's rowtin' stirk,
Or Pharaoh's famous kye.

He pat his penny i' the brod,
 His sowl into the psalm,
 Syne settled i' the land o' Nod,
 Like auncient Abraham.

An' at the market Weelliam got
 Top price for stock or strae ;
He never selt a cowt or stot
 Upon a rainy day.

He kent the field to saw wi' neep,
 The field wi' bear to saw,
 He kent the vailue o' a sheep,
 But—he did *not* ken law.

For, tho' he selt an auld dune mare,
 Wi' corns in ilka fit,
 To Cadger Jock at July Fair,
 An' didna warrant it,—

The simple cratur didna gie
 A line fra aff his haund
 To say what she was troubled wi',
 An' gar the bargain staund ;

An' Cadger Jock he had a freen,
 (Wha juist was hingin' roond,)
 Wha swore Klink drave the bargain keen,
 An' said the mare was soond.

An' this, atweel, was pairtly richt
 Ae way—if no anither,—
 She *roar'd* sae lood that weel she micht
 Be ca'd *a' soond thegither !*

Weel, sirs, they yokit to the law,
 At Perth,—syne Edinburgh ;
 An' Weelliam couldna rest ava'
 Thro' a' the weary worry.

For ilka morn there was a mail
 Wi' dockyments a plenty,—
 Law-papers lined his swallow-tail,
 His hat, an' his poke-manty.

O' sleep he couldna get a wink
 As lang's his case was waukin';
 Whiles on the road he stude to think,
 Whiles took the hill like mawkin'.

He tane to drink! begoud to swear,
 An' lead a wairdless life;
 He took a bond owre Whistlebare,
 And syne he took a wife.

An' that's the end o' Weelliam Klink,
 Wha bides at Whistlebare;
 He gaed straucht to the deil thro' drink,
 Upon an auld dune mare.

JOHN LOGIE ROBERTSON.

Obituary.

THE LATE MR. T. G. MURRAY, W.S.—The death of Mr. Thomas Graham Murray, W.S., on 10th March, came as a shock and a surprise to all. Till within a few days of his death Mr. Murray was in his usual health, going about and pursuing his usual active life; and, notwithstanding his considerable age, those who knew him and came into contact with him looked forward to a long extension of his career of usefulness. So late as Monday the 2nd March, the deceased gentleman had gone to Perth to attend a meeting of the County Council. The following Thursday morning, part of the bone of a pheasant lodged in his throat while he was at breakfast, and this was not removed until the Saturday evening. Inflammation having set in, he sank very rapidly, and died on the morning of Tuesday.

Mr. Murray will be greatly and widely missed. He was a man, not only of great mental vigour and consummate business aptitude, but also of versatility, and of wide and varied interests. Public affairs in very many different departments will feel his loss. As a lawyer, as a churchman, as a politician, as a county administrator, as an educationist, as a philanthropist, Mr. Murray had, by his great ability, taken a foremost place; and in all these relations his counsel was highly prized. The third son of Mr. Andrew Murray of Murrayshall, Perth, Sheriff of Aberdeen, Mr. T. G. Murray was born in Edinburgh on 24th November 1816. He spent all his youth between Murrayshall, where he resided in the summer, and Edinburgh, where the family lived in Heriot Row. From Edinburgh Academy he passed on to the University of his native city, and took the ordinary classes. At the close of his college course he was apprenticed to Mr. Ellis, W.S., and in 1838 he was admitted a member of the Society of Writers to the Signet. Ten years later—in December 1848—he married Caroline, fourth daughter of the late John Tod, W.S., and thus became a brother-in-law of Lord Mure, the late George Ross, and Robert Maconochie, and, subsequently, of Admiral Fellowes. In 1856 he entered into partnership with his father-in-law and brother-in-law, and this was the beginning of the now well-known firm of Tods, Murray, & Jamieson, W.S. Of that firm Mr. Murray continued to be a member until 1879, when he retired from active business, and devoted himself to the affairs of the Church of Scotland. In 1864 and 1868 he served as a member of the Royal Commissions on Landlords' Hypothec and on the Law Courts of Scotland respectively, and from 1866 to 1868 he filled the important office of Her Majesty's Crown Agent for Scotland. Mr. Murray also showed himself to be an enlightened patron of education, and it is chiefly to him that law-agents owe a valuable regulation which shortens the apprenticeship for those who are graduates in law. All along the deceased took great interest in the county of Perth. In 1853 he was granted a lease, which was afterwards renewed, of the small estate of Stenton, situated on the left bank of the Tay opposite Murthly. Shortly after the year 1860, Sir William Stewart, the then proprietor of Murthly,

insisted upon selling Stenton, and it was acquired by Mr. Murray. A Conservative in politics, and a trustee of the Scottish Conservative Club, the deceased gentleman was a Justice of the Peace for Perthshire, and a Member of the County Council for the district of Dunkeld, and had for several years taken a large share in county business. Mr. Murray was also a Deputy-Lieutenant of the County of the City of Edinburgh. His intimate connection with the University began by his being nominated the Lord Rector's assessor by the late Earl of Iddesleigh. He was afterwards appointed a Curator of the University, which, in the spring of 1888, bestowed upon him the honorary degree of LL.D. In the deceased the Royal Infirmary has lost, perhaps, one of its best friends. For many years he acted as Chairman of the Committee of Contributors, and in this connection he ably backed up the efforts made to obtain subscriptions from outside of the city in aid of the institution. Recently he was also very much concerned in the question of the extension of the Infirmary. He was likewise on the Committees of Management of the Association for Incurables, and the House of Refuge and Queensberry Lodge. Mr. Murray was associated with the revival of the Volunteer movement, being first Lieutenant, and afterwards, for a period of five years, Captain of the W.S. corps. He was particularly interested, and was practically the prime mover, in the getting up of the monument in St. Giles' Cathedral to the Marquis of Montrose, being, as one of the Grahams of Balgowan, one of the direct representatives of the families who officiated at the funeral. Although Mr. Murray retired from the active pursuit of the legal profession many years ago, he had not ceased to take an interest in its affairs or to exercise an influence on its welfare. It is the poorer for the loss of him.

THE LATE MR. WILLIAM FORBES, ADVOCATE.—By the death, on the 12th March, of Mr. Forbes of Medwyn, the legal profession of Edinburgh has been deprived of another well-known and venerable figure, and the Faculty of Advocates has lost its oldest member. Mr. Forbes was in his eighty-eighth year, having been born in 1803. He was a son of the late Hon. John Hay Forbes of Medwyn (Lord Medwyn), an able and

distinguished judge of the Court of Session. The late Mr. Forbes received his early training, under Dr. Carson, at the High School, of which he was dux, and afterwards completed his education at Medhurst, Sussex, and Edinburgh University. In 1825 he was admitted to the Faculty of Advocates. Mr. Forbes practised his profession till about 1857, in which year he obtained from the then Lord Advocate (now Lord Moncreiff) the important appointment of Secretary of the Board of Lunacy. He discharged the duties of his office with assiduity and ability until 1888, when, on account of failing health, he found himself unable to give that amount of personal attention to the affairs of the department which he deemed necessary, and therefore resigned. In politics Mr. Forbes was a pronounced Conservative, and took a warm interest in the question of party organisation. The deceased gentleman was an ardent adherent of the Episcopal Church in Scotland, and all along took an active part in guiding its deliberations. Mr. Forbes succeeded in 1854 to the paternal estate of Medwyn, Peeblesshire. Since then he resided a good deal at Medwyn House, on the improvement of which he spent a good deal of money, adding considerably to the estate by the purchase of adjoining properties. He took a keen personal interest in everything relating to the estate and the welfare of the tenants. Mr. Forbes was a Justice of the Peace and Deputy-Lieutenant of Peeblesshire, and paid considerable attention to county matters.

THE LATE A. B. M'GRIGOR, LL.D. — Dr. Alexander Bennet M'Grigor of Cairnoch, one of the most prominent citizens of Glasgow, and one of the best-known lawyers in the West of Scotland, died at Stirling on 22nd March, in his sixty-fourth year. The deceased gentleman has been in failing health for about three years. He was senior partner of the old-established firm of solicitors, M'Grigor, Donald, & Co.,—the firm having been founded away back in last century by Dr. M'Grigor's grandfather. Dr. M'Grigor was born in Glasgow in 1827, and was educated there. From a Glasgow contemporary we quote the following notice:—"Now that he is gone, we are free to say that A. B. M'Grigor more than sustained the prestige of the firm. For the last

five-and-twenty years at least he appeared in almost every important legal inquiry or negotiation in Glasgow. His practice, as may well be imagined, did not lie in our local Law Courts. His strength was exerted in Chambers, and in connection with private arbitrations involving large interests. He carried through Parliament the various Bills of the City Union Railway Company, and as legal adviser of that Company he acted on their behalf in the adjustment of claims made by merchants and proprietors whose places of business were taken under compulsory powers for the purposes of the line. These arbitrations were, in not a few instances, prolonged for many months on end; and although he was at liberty to obtain all needful assistance, Dr. M'Grigor preferred to act single-handed against what seemed to be overwhelming odds on the other side. In one instance he was pitted against the Lord Advocate (now Lord Young) and Mr. J. B. Balfour (presently Dean of Faculty), as senior and junior counsel respectively. But, whatever the odds, Dr. M'Grigor was never dismayed. His coolness and nerve sustained him in all circumstances, and, while he argued the case for his clients with firmness, he could never be accused of pressing that case unfairly. He had perfect grasp of the principles involved in cases of this kind, and he brought together his facts with such thoroughness, that in the end nothing was left for the most skilful gleaner, marshalling them, too, with the clearness and method of a singularly well-balanced mind. As adviser to the liquidators of the City of Glasgow Bank, Dr. M'Grigor's services were simply invaluable. But he was more than an accomplished lawyer—he was a man of wide culture, and leaves behind him a library of surpassing value. Greatly admired for his intellectual gifts, he was also highly esteemed by a wide circle of friends for his genial temperament, ready sympathy, and largeness of heart. He was ever ready to assist others by his means and wise counsel and far-reaching influence. Until his health failed, Dr. M'Grigor moved a good deal in society, and was an intimate friend of the late Sheriff Bell, who gathered around him men whose tastes, like his own, were largely literary and artistic. In music Dr. M'Grigor took great delight, and he was always ready to assist in the furtherance of local schemes of this nature—as

of all, indeed, which were likely to advance the interests of the city with which his family had been so long identified." The degree of LL.D. was conferred on him by the University of Glasgow, and for many years he acted as the Lord Rector's assessor in the University Court. In politics, Dr. M'Grigor was a Liberal Unionist.

THE LATE PATRICK JAMES STIRLING, LL.D. This scholarly gentleman and well-known lawyer died suddenly at Dunblane on the 22nd March. Dr. Stirling was the son of the minister of Dunblane, and was born there in 1809. He had a distinguished college career—first at St. Andrews, and afterwards at Edinburgh. He passed as a Notary in 1830; and for upwards of half a century he was actively and successfully engaged in the practice of his profession of Solicitor in West Perthshire. Dr. Stirling was an author of some note. In 1846 he published a work on *The Philosophy of Trade*, and in 1853 he published his book on *The Gold Discoveries*. Both of these were translated into French. He also translated into English the works of Frederick Bastiat. Dr. Stirling's degree of LL.D. was conferred on him by the University of St. Andrews in 1867.

MR. JOHN BURNET, Advocate (1856), died on 21st March, in his fifty-eighth year. Mr. Burnet, who long held the office of Advocate-Depute, will be remembered as a most skilful prosecutor.

MR. JAMES MURRAY GARDEN, Advocate, one of the leading lawyers in Aberdeen, died there on the 4th March.

MR. WILLIAM JAMES SMALL, Solicitor, Dundee, died at Pau on 14th March, at the age of forty-six.

MR. SAMUEL DICKSON, W.S. (1855), Edinburgh, died on 22nd February, in his sixty-sixth year.

MR. JAMES GUTHRIE DAVIDSON, Advocate and Solicitor at Singapore, died there on 8th February.

WILLIAM ARCHIBALD HUNTER, LL.B., Solicitor, Duns, died in Chicago, U.S.A., on 20th March. Mr. Hunter was clerk to the County Council of Berwickshire.

The Month.

An Amusing Jurymen.—In the High Court of Justiciary last month, two women were charged with the theft of a diamond brooch and ring from a shop in Princes Street, Edinburgh. After an exhaustive trial, and the usual speeches of counsel and the Bench, the jury retired to consider their verdict. On their return to the jury-box, and in answer to the Clerk of Court as to the terms of their verdict, a burly, pompous little individual stood up as the foreman of the jury, and then announced the verdict thus,—“My lord, and ladies and gentlemen in Court.” [Lord Adam: “Never mind the ladies and gentlemen, address the Court only.”] “I beg pardon, my lord. I have *great pleasure* in stating that the jury by three to nine—no, nine to three (of course, there were fifteen) find the prisoners not—no, I mean guilty.” It was evidently his first appearance in the character of foreman, and in the opinion of his friends in the box and the audience he made a distinct hit.

* * *

Precedents of Judicial Incapacity.—The questions asked in Parliament respecting the capacity of one of the judges of the High Court to discharge the duties of his office, give an interest to the following instances of judicial incompetency. The illustrations to which we direct attention are all Irish; for in Ireland the force of public opinion in official circles was, a generation or two ago, almost imperceptible, and is at the present moment weaker than in England.

On the 5th May 1826, Mr. Scarlett, afterwards Lord Abinger and Lord Chief Baron of the English Court of Exchequer, presented to the House of Commons a petition complaining of the inability of Lord Norbury, the Chief-Justice of the Irish Court of Common Pleas, to discharge judicial functions. Private members had then the privilege of making a speech explaining the object of a petition, and of moving a resolution and instituting a debate on the subject-matter to which the petition related. The petitioner in this

case was Daniel O'Connell, "the Irish barrister," who was a couple of years afterwards destined to be famous in Parliament. Catholic emancipation had not been carried, and Parliament was still unreformed, and O'Connell could not obtain the services of one out of the hundred Irish members to present his petition. Mr. Scarlett moved no resolution, regretted the case was not in the hands of an Irish member, and stated he presented the petition to show "he would not shrink from the discharge of any duty, however odious it might be, relative to the administration of public justice." Mr. O'Connell in his petition begged it to be understood that he preferred no imputation on the honour or integrity of the learned lord. He alleged simply that he was incapacitated from the adequate performance of his judicial duties by the infirmity of old age. In particular, Lord Norbury was so subject to lethargic stupor, that he would frequently fall fast asleep in the middle of the trial over which he was presiding. In one instance, it occurred that on a trial of murder, which took place in Ireland, he fell asleep, and so remained during the greater part of the evidence. The consequence was that he delivered such a charge to the jury as led to the conviction of the prisoner, who, however, was afterwards very properly pardoned. Another instance was mentioned. At Mullingar, six persons were tried before Lord Norbury, who was sound asleep during the greater part of the trial. The fact of his being asleep was so notorious, that the barrister who conducted the prosecution requested the jury to take notes of the evidence, in order that they might inform the judge of what had passed when he awoke. Mr. O'Connell also stated in the petition that he was well aware that his interests were opposed to the course he had adopted in bringing the subject before Parliament, but his motives were pure and for the public benefit. Mr. (afterwards Sir) Robert Peel, who was then Chief Secretary for Ireland, while eulogising Lord Norbury, stated that he would probably have resigned if he could have done so without the imputation of being intimidated by the threat of that petition. This rather lukewarm defence can be explained by the fact that when Lord Norbury, some time previously, had been sounded by the "Castle" on the subject of his resignation, he threatened to call out (he had been a notorious duellist in early life) any one

who ventured again to broach the topic. O'Connell's petition, however, did good, for early next year Lord Norbury, who was then eighty-six years old, retired.

Again, on the 3rd May 1866, forty years almost to the very day after the Norbury incident, the case of another Irish Chief-Justice—Lefroy—was brought under the notice of Parliament. Mr. Bryan, one of the members for Kilkenny County, asked the Attorney-General for Ireland, Mr. (afterwards Mr. Justice) Lawson, whether he had seen a statement publicly made to the effect that the Lord Chief-Justice of the Queen's Bench in Ireland, when passing sentence of death on a prisoner, was unable to read the sentence, although it was written for him in large handwriting, and that his lordship required and had the assistance of some other person in the discharge of that solemn duty. The Attorney-General, in reply, simply admitted the substantial accuracy of the statement. Mr. Anthony Lefroy, who represented Trinity College, Dublin, and was the son of the Chief-Justice, was thereupon permitted by the House to maintain in argument the judicial capacity of the Chief-Justice, stating the Attorney-General had failed to do justice to his father. Mr. Lawson then said that, as the hon. gentleman had cast a doubt upon the correctness and accuracy of his statement, he would relate what occurred in his presence on the occasion in question. The day on which the execution was to be carried out had been arranged beforehand, and the officer of the Court wrote out in large writing for the Chief-Justice the sentence to be pronounced, and the Chief-Justice proceeded to pronounce it, but was totally unable to do so in the legal form. He omitted in the sentence a material direction, the omission of which would have rendered the sentence bad in point of law. It became upon this his duty as Attorney-General, prosecuting for the Crown, to call the attention of the Chief-Justice to the irregularity and omission in the sentence, and he was obliged himself to stand near him at the Bench and ask him to repeat over again, in legal form, that sentence, and he actually dictated to him the sentence in the legal form which the Chief-Justice delivered. These were the simple facts, and the statement of them could be verified by those present. A few months afterwards, the Conservative Government, by which Chief-Justice Lefroy was appointed,

came into office, whereupon he immediately resigned, being at the time in his ninety-first year.

These retirements were no doubt due to the attention directed to these scandals by their mention in Parliament. Another judicial resignation was due to a prisoner. A Mr. Pennefather, who was on the Irish Bench during the forties, lost his sight; he still retained his post. A prisoner, whom he was trying for writing a threatening letter, asked his lordship to examine the document so as to compare the writing with writing of the prisoner. This observation was the direct cause of his lordship's retirement.—*Law Times*.



The Irremovability of the Judges.—A judge of the Supreme Court, as is now at any rate well known, is only removable by the Crown on address presented by both Houses of Parliament. So it is enacted by section 5 of the Judicature Act 1875, re-enacting in effect the Act of Settlement, previous to which the judges were subject to removal by the Sovereign at any time, at his absolute will and pleasure, without reason assigned. This mode of removal, on address by both Houses, which springs from a time when it was necessary to interpose some barrier of this kind to protect the people from the tyranny or caprice of the Sovereign, is scarcely a satisfactory one. It is no doubt extremely difficult to suggest an alternative procedure, but it may be useful to consider the different modes by which different officials, high and low, may be removed from their offices. First and foremost, let us take the case of archbishops and bishops. This is provided for by a very recent statute, the Bishops' Resignation Act 1869 (32 & 33 Vict. c. 111), at first a temporary Act, which was made perpetual in 1875 by 38 Vict. c. 19, till which date a very similar Act of 1843 (6 & 7 Vict. c. 62) contained the law of the subject. By the Act of 1869, sec. 3, "if it appears to any archbishop on credible evidence that any bishop within his province is incapacitated by reason of permanent mental infirmity from the due performance of his episcopal duties, he shall call to his aid two bishops of his province, and such archbishops and bishops shall inquire into the evidence of such incapacity, and if satisfied thereof, shall certify under

their hands and seals the fact to one of Her Majesty's Principal Secretaries of State, together with the evidence on which their certificate is founded." By sec. 4, on the receipt of the certificate, the Queen may grant a licence to the Dean and Chapter to elect a "bishop coadjutor," in whom, by sec. 5, the spiritualities of the see and the patronage of the bishop are to vest in the same way as if he were bishop, with a salary of £2000 a year, the bishop himself to retain his rank and all the temporalities. The inquiry is carefully regulated by subsequent sections, which provide for summoning of witnesses, and for their cross-examination on behalf of the bishop proposed to be deprived, but providing also that a finding of lunacy in due course of law is to be conclusive evidence of incapacity. By sec. 12 a somewhat similar procedure, with suitable variations, is provided for the appointment of a bishop coadjutor "in the case of an archbishop being incapacitated by reason of permanent mental infirmity from the due performance of his duties."

Thus much of archbishops and bishops. Secretaries of State, civil servants generally, and officers, naval and military, being liable to instant dismissal at any moment by the Crown without reason assigned, it has not been thought by Parliament to be necessary to provide specially for the removal of the incapable. The case of infirm judges and officers of a lower rank than the judges of the Supreme Court, however, is fully provided for. Thus, judges of the County Courts may be dismissed for inability or misbehaviour by the Lord Chancellor under section 15 of the County Courts Act 1888; and sec. 8 of the Coroners Act 1887 contains a like provision as to coroners. Officers of the central office of the Supreme Court (including masters) may be removed by a majority of the appointing body of judges, with the approval of the Lord Chancellor, for reasons to be assigned in the Order of Removal (Judicature (Officers) Act 1879, sec. 9); and Chancery Visitors in Lunacy are removable, for any disability, by the Lord Chancellor alone, without reasons to be assigned (Lunacy Act 1890, sec. 164). Recorders, indeed, though they hold office during good behaviour only, under sec. 163 of the Municipal Corporations Act 1882, cannot be got rid of, if incapable, by any express statutory process; but by the curi-

ous Recorders, Magistrates, and Clerks of the Peace Act 1888 (51 & 52 Vict. c. 23), "if at any time it appears to the authority having power to appoint a recorder, or a stipendiary magistrate, or a clerk of the peace, that the recorder, magistrate, or clerk of the peace is, by reason of illness, incapable of appointing or removing a deputy, such authority may exercise that power on his behalf;" and there is a similar provision as to deputy County Court judges in section 18 of the County Courts Act 1888. Finally, justices of the peace, and therefore perhaps all stipendiary magistrates, may be discharged from their offices at any time by writ under the Great Seal at the absolute pleasure of the Sovereign.

Such being the law, the position is this: Her Majesty's judges, who by infirmity and inefficiency may do greater mischief than any other class of servants of the Crown, and are irresponsible to the public in any form for such mischief, stand absolutely alone as irremovable for any cause whatever except upon an address by both Houses of Parliament.—*Law Times*.



Advocacy in the High Court of Madras.—The following are the Amended Rules for the Qualification and Admission of Persons as Advocates of the High Court of Judicature at Madras:—

In supersession of all existing rules for the qualification and admission of proper persons to be advocates of the High Court of Judicature at Madras, the High Court, in the exercise of the authority conferred by sections 9 and 10 of the Letters Patent (Amended), has made and passed the following rules, and is pleased to direct that they shall come into force on February 4, 1891.

Provided that any person who on January 1, 1891, was actually serving as an apprentice to an advocate of the High Court, and who, on or before January 31, 1892, shall make application for admission in accordance with the rules now in force, shall be entitled to have his application dealt with as though those rules were still in force, anything in the rules now made to the contrary notwithstanding.

1. Subject to the conditions hereinafter stated, any person

who is entitled to practise as a barrister in England or Ireland, or as an advocate in the principal Courts of Scotland, any person duly admitted and on the Roll of Advocates of the High Court of Calcutta, Bombay, or Allahabad, and any person who, having been admitted to the degree of Master of Laws in the University of Madras, has studied for eighteen months with an advocate of the High Court of Madras, may be admitted as an advocate of this Court.

2. In the case of a person entitled to practise as a barrister in England or Ireland, or as an advocate in Scotland, the applicant must produce a certificate showing that he is so entitled to practise, together with satisfactory testimonials to his good character and ability.

3. In the case of an advocate duly admitted and on the Roll of Advocates of the High Court of Calcutta, Bombay, or Allahabad, the applicant shall produce a certificate of such admission and enrolment, and also a certificate of character and ability, signed by a judge of the Court of which he is an advocate, or by the Advocate-General of the same Presidency.

4. The application referred to in the two preceding rules shall be made by letter to the registrar, and shall show the date when the applicant was called to the Bar and the number of terms kept by him. If it shall appear that any applicant has been called to the Bar without keeping the full number of terms, he shall not be admitted as an advocate unless he shall satisfy the Court that he had sufficient cause for failing to keep the full number of terms.

Every application for admission under these rules shall be brought and moved before a Bench of which the Chief-Justice is a member.



A Lincolnshire Jury.—At Lincoln Assizes, in February, the jury, after hearing a case of felony from Gainsborough, brought in a verdict of not guilty, when Mr. Justice Grantham at once discharged them from their duties, and swore another jury. Addressing the defendant, his lordship said: "John Regan, the jury which has tried you has said you are not guilty. I don't suppose there is another

individual in this Court who will agree with them. You are a lucky man, and you will be discharged. It used to be said when a case was perfectly hopeless and a man's guilt quite clear, that nothing could save him but 'a Cardiganshire jury.' In future it will be said that nothing but 'a Lincolnshire jury' would save him."



Assisting the Jury.—"Gentlemen of the jury," said a Minnesota judge, "murder is where a man is murderously killed. The killer in such a case is a murderer. Now, murder by poison is just as much murder as murder with a gun, pistol, or knife. It is the simple act of murdering that constitutes murder in the eye of the law. Don't let the idea of murder and manslaughter confound you. Murder is one thing, manslaughter is quite another."



Women as Solicitors.—Why should not women be allowed to practise as solicitors? asks the *Eastern Morning News*. A case of considerable hardship has recently been brought before the Incorporated Law Society. A country solicitor wished to ask to be allowed to article his daughter. She had for several years helped him in his business, and was prepared to undergo the examinations required by statute. Her father urged, in addition, that he had no sons, and that he was anxious to make provision for his daughter. The Society, however, in accordance with precedent, refused to admit the lady to the profession. This decision may be legally correct, but, without doubt, it is socially unjust. It cannot be alleged that the public would suffer any greater inconvenience from the existence of women solicitors than it does from the existence of women doctors. The work of a solicitor is in no way inconsistent with the popular opinion of what is suitable for women to do. Some solicitors conduct the whole of their business from the inside of their offices, leaving to clerks or to junior partners such excursions to the Law Courts as are required. The truth is, that women are refused admission as solicitors, not on the ground of public policy, but of trade-union jealousy.

Many Parts.—A local barrister practising at Manchester, who has had a receiving order made against him, stated in his examination that he came to the Bar without a penny, and immediately began to borrow money at fearful interest. Also he had a wife. Further, he had a third share in a fish shop, and also carried on business as owner of a patent lace fastener. We have every reason to believe that this is not an isolated instance of a barrister making his profession one of several callings. It is necessary to keep a watch on this sort of thing.



Merry Law Reports.—The English Law Reports are not the place one usually resorts to for occasions of amusement, and yet one sometimes comes upon some bright jewel in their dull and decorous pages suitable for the mirth of grave and sober men, such as, we all know, the legal profession is composed of. One of these solemn jokes is the case of *Haslewood v. Consolidated Credit Co.*, 25 Q. B. D. 555. The action was one of trespass, instituted in the Lord Mayor's Court. The defendants justified their acts under a chattel mortgage for £30 made by the plaintiffs. The plaintiffs claimed the mortgage was void under the Bills of Sale Act, and its validity turned upon the question whether the variations it contained from the form prescribed by the Act were of such a character as to be readily understood without legal assistance. The plaintiffs claimed that they were not, and that the stipulations for repayment of the loan were obscure and difficult to understand. The plaintiff was non-suited in the Mayor's Court, and then appealed to the Queen's Bench Division, and it so happened that the Divisional Court on this occasion was composed of no less exalted personages than the Lord Chief-Justice and the Master of the Rolls, who, after a solemn, critical, grammatical consideration of the terms of repayment, were agreed that they were obscure and difficult to understand, and that the chattel mortgage was therefore void. With a persistence paralleled only by the insignificant amount at stake, the defendants appealed to the Court of Appeal, where Lindley and Bowen, LJJ., presided. After hearing argument, they evidently felt a little delicacy in overruling the two chiefs, so they ordered the case to be reargued before

the full Court (Cotton, Lindley, and Bowen, L.JJ.), and upon its coming up before them, the counsel for the appellants were not even called on. After hearing what the respondent's counsel had to say, they unanimously reversed the decision of the Lord Chief-Justice and the Master of the Rolls, and not only dissented from their law, but politely ridiculed their grammar, and held the clause perfectly plain and unambiguous. One would have thought that the very fact that two eminent judges should differ from three others on its construction was *prima facie* evidence that it could not be very clear; but it so happened that in *Goldstrum v. Tallerman*, 18 Q. B. D., to which Lord Esher, M.R., himself had been a party, the Court of Appeal had decided that such a difference of opinion among judges had no such result. Bowen, L.J., tried to soften the blow by ascribing the difference of opinion between the Court of Appeal and the Divisional Court to the fact that the Court of Appeal had the case of *Goldstrum v. Tallerman* in their minds, which the Court below had not; yet the reporter, with a brutal regard for accuracy, is careful to state in a footnote that that case was cited to the Divisional Court: perhaps the true explanation of the decision of the Divisional Court is to be found in the fact that the mortgage bore interest at the modest rate of 60 per cent. per annum; and it was, as Carlyle would say, a case of "approximate justice striving to accomplish itself in one way or another." As an instance of the marvellous persistency of litigants, and the occasional apparent obtuseness of the ablest judges, and the indiscretion of law reporters, the case in question is a striking instance.—*Canada Law Journal*.



A LEADING barrister of New South Wales recently perpetrated a delightful bull. "Gentlemen of the jury," he thundered, "the case for the Crown is a mere skeleton,—a mere skeleton, gentlemen, for, as I shall presently show you, it has neither flesh, blood, nor bones in it." In the adjoining colony of Victoria, Sir Bryan O'Loughlen, M.P., who has a national right to indulge in this sort of thing, gravely told the Supreme Court that "a verbal agreement is not worth the paper it's written on."—*Irish Law Times*.

Justices of the Peace.—In the House of Commons, on 10th March, Mr. Seale-Hayne asked the First Lord of the Treasury whether, having regard to the dissatisfaction which exists in certain quarters with reference to the present method of appointment, and the required property qualification of justices of the peace, he will consent to the appointment of a Select Committee to investigate the causes of this dissatisfaction, to which the Bills dealing with these subjects, now before Parliament, may be referred.—Mr. W. H. Smith: The question of abolishing the property qualification required by law for justices of the peace has recently been discussed in the House of Lords, and a Bill for such abolition was rejected on the second reading. Under these circumstances, the hon. member will understand that I cannot give such consent as he wishes. I am not aware of the existence of dissatisfaction such as the question suggests.

* * *

Prospectuses and the Directors' Liability Act.—A new device has been discovered by the draughtsmen of prospectuses. It has for some time past been customary to insert in prospectuses a clause to the effect that applicants for shares waive all claims against directors for infringements of sec. 38 of the Companies Act 1867, which requires all contracts entered into on behalf of the company to be specified. The validity of such clauses has been declared to be very doubtful on the high authority of Lord Justice Lindley ("Companies," 5th ed. 1889, p. 92). However, Mr. Buckley, Q.C., seems to think the clause valid, for he says it is in many cases quite necessary, and submits that it is "a valid abnegation of the right to sue in respect of this cause of action" ("Companies," 5th ed. 1887, p. 542). Be this as it may, the new clause which is now added is still more startling. Now we read that "applicants for shares shall also be deemed absolutely to waive all rights of compensation under the Directors' Liability Act 1890." If this means anything, it means that when the directors of a company have committed a fraud, which is, of course, unknown to the applicant for shares when he makes his application, the mere fact of his having signed the application appended to a prospectus containing the novel

clause is sufficient to debar him from obtaining any of the relief afforded by the Directors' Liability Act. It is quite another thing to say that the applicant abnegates his claim to such relief after he obtains full knowledge of the facts constituting the fraud. This might very well be the case. It is difficult to believe that in the former case he would be denied the benefit of the new Act. And whether he is or not, it is tolerably clear that the company's right of action against its directors or promoters for their fraudulent statements would remain intact.



Plant v. Potts.—Revising barristers will read with some interest the case of *Plant* (app.) v. *Potts* (resp.) (63 L. T. Rep. N. S. 730), which raises a somewhat important question as to the power of a revising barrister to amend the description of a voter's qualification. Priestly Aked's name was on the list of ownership electors for the Altrincham Division of Cheshire, and John Plant duly objected to it remaining there. The nature of Aked's qualification was stated in the third column of the list to be "freehold house," whereas it was proved that the house in question was leasehold and not freehold, and that Aked's interest only constituted a qualification of a leasehold nature. It seems not to have been denied that Plant's objection must succeed, unless the list were amended by altering the word freehold to leasehold in the third column. The revising barrister came to the conclusion that the Parliamentary and Municipal Registration Act of 1878, extended to ownership voters in counties by 48 Vict. c. 15, had enlarged the power of amendment, and that the case came within sec. 28, sub-sec. 12, of that Act. He therefore altered the list, changed the word "freehold" in the third column into "leasehold," and retained Priestly Aked's name on the list. A case was stated for the Queen's Bench Division, and Justices Williams and Lawrance erased Priestly Aked's name from the list against the judgment of Mr. Justice Grantham. On appeal by the Clerk of the County Council of Cheshire, the decision was upheld, and Priestly Aked's name remained erased from the list. The true construction of the Acts were pointed out in *Foskett v. Kauffman* (54

L. T. Rep. N. S. 64), where it was held that under sub-sec. 12 a revising barrister could amend an insufficient or inaccurate description in the third column, but that if the description in the third column did describe sufficiently and accurately a qualification known to the law, then, by virtue of the proviso in sub-sec. 13, the revising barrister could not alter that sufficient description into another sufficient description of another qualification. In other words, if a description is merely inaccurate or insufficient, it may perhaps be altered; but a revising barrister has no power to alter the description given in the list into a description of another and different qualification. No doubt, in boroughs, if a proper declaration is made, though not otherwise, it may be possible to amend a wrong description in the third column. In counties, however, there is no power to alter the description at all; but a new claim must be made by the person whose qualification has been wrongly described. A good deal of the trouble seems to have arisen owing to the insertion of the words "except as herein provided" in the Act of 1878—words harmless in themselves, but which, under the circumstances, seem to have had no meaning at all, and only became a puzzle.—*Law Times*.

Reviews.

The Practice of the Sheriff Courts of Scotland in Civil Causes.

By JOHN DOVE WILSON, LL.D., Advocate. Fourth Edition. By J. C. DOVE WILSON, M.A., LL.B., Advocate. Edinburgh: Bell & Bradfute. 1891.

ON the appearance of a new edition of a work which has taken and maintained so unquestioned a place in the libraries of practitioners as Mr. Dove Wilson's *Sheriff Court Practice*, it would be superfluous to do more than state that the revision has been well and accurately done. The materials to be given effect to are plentiful; and we congratulate Mr. J. C. Dove Wilson on the manner in which he has brought the work up to date.

The Law relating to the Property of Married Persons ; with an Appendix of Statutes and Notes. By DAVID MURRAY, M.A., LL.D., Glasg., Member of the Faculty of Procurators in Glasgow. Glasgow: Maclehose & Sons. 1891.

THE field which Mr. Murray has chosen is not altogether untilled, but it is one in which much remains to be done. The present treatise is a successful attempt to state clearly, and with reasonable brevity, this branch of marriage law as it stands to-day. A useful element in the work is an Appendix of Statutes, with Notes.

Principles of the English Law of Contract and of Agency in its relation to Contract. By SIR WILLIAM R. ANSON, Bart., D.C.L., of the Inner Temple, Barrister-at-Law, Warden of All Souls' College, Oxford. Sixth Edition. Clarendon Press, Oxford.

THIS is one of those legal text-books which hold a position in the first rank, though originally composed from the point of view of a teacher rather than a practitioner, and for the use of students rather than of full-fledged lawyers. This eminence is due to two characteristics which the work possesses in a high degree—namely, bold statement of general principles, and completeness of view. In more elaborate treatises of the “practical” order, the former of these characteristics is only too apt to be lost amid perplexity of detail, while in “elementary” treatises the enforcement of leading maxims is not unlikely to obscure the systematic unity of the whole subject. Sir William Anson wrote expressly to avoid both Scylla and Charybdis, and the measure of his success may be learned, in some degree, from the fact that he has lived to bring out a sixth edition. The chapters on Offer and Acceptance, and certain others, have been entirely re-written, and the whole book is brought thoroughly abreast of the current reports, including those of the *Times* and *Law Times*, with regard to which the learned author says in his preface: “I do not feel compelled to apologise for this diversity of references. The apology should come from the editors of the

Law Reports, whose selection of cases and manner of reporting are a grievance to all concerned in the study or practice of the law."

Manual of the Elections (Scot.) (Corrupt and Illegal Practices) Act 1890, with relative Act of Sederunt, and Appendix containing the Acts of 1883 and 1885, with Index. By J. EDWARD GRAHAM, Advocate. Edinburgh: Blackwood & Sons. 1891.

THE statutes named in the title will be found in a convenient form in this little book; and Mr. Graham introduces them by a well-arranged analysis of the Act of last year. The Acts, we need scarcely say, are of considerable importance, and when elections come upon us they have a wide part to play. We can recommend Mr. Graham's *Manual* to all who would avoid the pains and penalties of their infringement.

English Decisions.

FEBRUARY—MARCH.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

WILL.—*Construction*—*Gift during widowhood*—*Gift over on death*.—J. T. devised all his real estate to his wife for her life if she should so long remain his widow, and he gave his real estate subject to her interest and his personal estate to trustees upon trust for sale and conversion, and to pay the income to his wife during her life or until she should marry again; and from and immediately after the decease of his said wife, upon trust thereout to pay the legacies thereafter given, all which said legacies, although the payment thereof was postponed until after the decease of his said wife, the testator directed should be deemed and taken as vested immediately on his own decease. The testator made a codicil to his will, whereby from and after the death of his said wife he gave and bequeathed further legacies to some of the legatees named in the will, and revoked certain legacies given by his will and substituted other legacies therefor. The testator died in 1875, and his widow married again in 1890. *Held* (by Mr. Justice North), that there was enough in the will to show that the

testator intended the legatees to take on the determination of the wife's interest, and that the legacies given by the will and the substituted legacies given by the codicil were payable upon her second marriage, but that the additional legacies given by the codicil were only payable on her death.—*Re Tredwell ; Jaffray v. Tredwell*, High Ct., Ch. Div., 1 February.

MASTER AND SERVANT.—*Agreement by servant to "give the whole of his time" to the business of his master—Injunction to restrain servant from entering into a rival business.*—The plaintiff company was incorporated in 1883 for the purpose of working a patent process for carbonisation of coal and coal shale, and the treatment of coal gas for obtaining benzole, solvent naphtha, and the like. In 1885, the defendant, who had a special knowledge of the business so carried on by the company, entered their service for five years as manager of their works, under an agreement dated in September 1885. In 1889, when the term of five years was about to expire, a further agreement, dated July 1889, was entered into. It recited the original agreement, which was varied by extending the term of management to one of ten years from September 1885. It was expressly provided by the agreement that the manager should "give the whole of his time to the company's business;" he should give due diligence to the performance of his duties, and should conform to the reasonable requirements of the board of directors; and he should reside within two miles of the company's works. In January 1891 it came to the knowledge of the plaintiff company that the defendant had entered into a scheme for establishing in the immediate neighbourhood of the plaintiff company's works a rival manufacturing company for the carbonisation of coal under the same process as that in use by the plaintiff company, of which rival company the defendant was to be a director, and was to invest a large sum as capital therein. Thereupon the plaintiff company commenced an action against the defendant, and a motion was now made for an injunction to restrain the defendant from setting up any business, or entering into any agreement, or making any engagement with any person or company (other than the plaintiff company), by which the whole of the defendant's time would cease to be devoted to the business of the plaintiff company, or by which the defendant would be prevented from carrying out the agreement of July 1889, and, in particular, from assisting in the formation of and from becoming a director, manager, or agent of any company or partnership then or thereafter to be formed, for the purpose of carrying on a similar business and manufacture to those carried on by the plaintiff company, until the hearing of the action or further order. *Held* (by Mr. Justice Kekewich, on the authority of *Lumley v. Wagner*, 1 De G. M. & G. 604, and *Montague v. Flotton*, 28 L. R. 16 Eq. 189), that the plaintiff company were entitled to an interim injunction; but that the same must be limited to the terms of the agreement.—*The Whitwood Chemical Company Limited v. Hardman*, High Ct., Ch. Div., 6 February.

NULLITY.—*Undue publication of banns—False surname and address of husband—Wife not privy to the fraud—Refusal of decree.*—The husband caused his banns to be published in the name of, and at the time of the ceremony of marriage signed the register as, “James Joseph M'Donald, bachelor, lithographer, resident at time of the marriage at Branston Street, Birmingham, son of Thomas M'Donald, carpenter, Branston Street.” His real name was James Joseph M'Donnell: his father's name was Michael M'Donnell, police sergeant, and his residence Bristol Road, Birmingham. The husband was nineteen years of age, and was still under articles of apprenticeship at the time of the marriage. He and his father were Roman Catholics. The marriage was solemnised on 29th September 1862, after publication of banns, at the parish church of All Saints, Birmingham. The wife was fifteen years of age at the time of the marriage, and her name and address were said to have been correctly stated in the banns book, which had been lost or destroyed, and were so entered upon the register. Her parents were present at the marriage, which was, however, kept secret from the husband's family and from his master. The incorrect name and address of the husband were said to have been given for the purpose of concealing the marriage from the husband's family and from his master. The cohabitation only lasted for about sixteen months from first to last. The husband deserted his wife early in 1864, five days after the birth of their second child. The wife saw nothing more of him till about 1875. In 1872, believing her husband to be dead, she went through a ceremony of marriage in New York with John Wilfred Tritton, with whom she had ever since lived and cohabited. She now sought to have the first marriage annulled. The husband did not appear in the proceedings. *Held* (by Mr. Justice Jeune), upon the facts, that it was not perfectly clear that the wife was a consenting party and privy to the mis-descriptions upon the publication of the banns and upon the marriage register; and that as, in such a case as this, in order to annul the marriage, both parties must be conclusively proved to have knowingly and wilfully participated in the fraudulent concealment, this not having been done to the satisfaction of the Court, the petition must be dismissed.—*M'Donald otherwise Churcher v. M'Donald*, High Ct., Probate, Divorce, and Admiralty Div., 6 February.

WILL.—*Construction—Condition of sale—Power to annul sale.*—Testator appointed B., then residing in Australia, “if and when he should return to England,” and A., trustees and executors of his will, and devised a freehold estate to his trustees upon trust for sale. B. never proved the will or acted in the trusts, but never executed a disclaimer of them. Some years after the testator's death he came to England for the benefit of his health, stayed there six months, and then returned to Australia. *Held* (by the Lord Chief-Justice and Lord Justices Lindley and Kay), that without laying down any hard-and-fast rule as to what length of resid-

ence in England would fulfil such a condition, the residence of B. in England, having been for a substantial time, was sufficient to satisfy the condition, and that the unsold estate vested in B. A condition of sale provided that if the purchaser insisted on any requisition which the vendors were unwilling or unable to comply with, the vendor might annul the sale "notwithstanding any previous negotiation or litigation." *Held*, that the words "notwithstanding any previous litigation" could not be strained so as to include a final judgment on the question in dispute, and the condition did not apply after a judicial opinion had been given adverse to the title.—*Re Arbib and Class' Contract*, Court of Appeal, 10 February.

SHIP.—*Demurrage—Charter-party—Cesser clause—Bill of lading—Delay caused by strikes—Liability of consignee of cargo.*—By a charter-party it was agreed that a vessel should proceed to a port in the Sea of Azoff, and there take on board a cargo of wheat, and being so loaded should proceed to a port in the United Kingdom to discharge, the charterers' liability to cesser when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at the port of discharge; the 1885 bill of lading to be used under the charter, and its conditions to form part thereof. The master signed bills of lading for the cargo in the form prescribed by the charter-party, but they contained no reference to the charter-party, nor any exemption which would relieve the receivers of the cargo from loss occasioned by strikes. The bills of lading stated that the goods were to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom-house, otherwise the master was to be at liberty to put into lighters, and land the same at the risk and expense of the owners. The vessel arrived in London on August 14, and the discharge of the cargo proceeded from the 15th down to the 20th, when a strike occurred among the dock people who were employed by the consignee of the cargo to discharge the vessel. In consequence of the strike, the discharge of the vessel was not completed until September 18. The shipowner sued the charterer and the consignee of the cargo for demurrage and damages for the detention of the vessel. *Held* (by Mr. Justice Mathew), that under the cesser clause above set out, the liability of the charterers ceased upon the arrival of the vessel at the port of discharge, but that the consignees of the cargo were liable, as they had not discharged the vessel within a reasonable time.—*Hick v. Rodocanachi and others*, High Ct., Q. B. Div., 11 February.

EVIDENCE.—*Promissory note—Insufficient stamp duty—Stamp Act 1870 (33 & 34 Vict. c. 97).*—The defendant in an action claimed to have made certain advances, and he tendered as evidence of one of the loans a promissory note for £40, which was stamped with a penny stamp only. The plaintiff objected that a promissory note stamped with a penny stamp only was not admissible as evidence of the receipt of the money. The defendant admitted

that the document was a promissory note, and insufficiently stamped as such, but he contended that, although it could not be admitted as a promissory note, it ought to be admitted as evidence of the receipt of the money. *Held* (by Mr. Justice Kekewich), that the receipt of the money was of the essence of the promissory note, and that to admit it as evidence of the loan would not be to admit it for collateral purposes, but would be making it available in the very way that the Stamp Act 1870 said should not be done; therefore, that the Court was bound to reject it as evidence.—*Ashling v. Boon*, High Ct., Ch. Div., 12 February.

TRADE MARK.—*Registration—Fraudulent user of old mark—New mark—Patents, Designs, and Trade Marks Act 1883* (46 & 47 *Vict. c. 57*).—*Held* (by Mr. Justice Romer), that where an applicant seeks to have a trade mark registered as a new mark, but has previously used substantially the same mark with the addition of certain words which made the user fraudulent, he is not entitled to have such new mark registered, omitting the objectionable words, so as to enable the applicant to obtain the benefit of the old fraudulent user.—*Re Fuente's Trade Marks*, High Ct., Ch. Div., 12 February.

LOCAL AUTHORITY.—*Rates—Liability for old debt.*—In the year 1885, the plaintiff, Lord Jersey, obtained an injunction restraining the defendants, the Uxbridge Union Rural Sanitary Authority, from discharging sewage into a certain watercourse, and the sanitary authority were ordered to pay the costs of the action. No step was taken towards taxing or obtaining payment of the costs until April 1890, when the plaintiff had his bill of costs taxed, and by the taxing master's certificate, dated the 25th April 1890, they were certified at the sum of £633, 2s. 10d. On 7th August 1890, Lord Jersey obtained a garnishee order *nisi* attaching certain sums in the hands of the treasurer of the sanitary authority. This was discharged on motion before the Vacation judge, upon the ground that the sums in question being raised by rates to meet the expenses of the year 1890, could not be made liable for a judgment obtained in 1885. On the 22nd January 1891, Lord Jersey issued an *elegit* to extend the lands of the defendants. The defendants now moved to set aside that writ, on the ground that execution could not be issued in respect of a debt which the defendants could not lawfully pay. *Held* (by Mr. Justice Stirling), that the motion was premature. It had no doubt been rightly decided by the Vacation judge that the plaintiff was not entitled to be paid out of the rates or money representing the rates of a subsequent year. It could not, however, be assumed that there was no property which could be made available to satisfy the claim. It was quite possible that the defendants possessed land which would be available for payment of the debt, and it would not, therefore, be right to set aside the writ and prevent an inquiry by the Sheriff as to what property the defendants had. The motion must, therefore, be dismissed

with costs.—*Lord Jersey v. Uxbridge Union Rural Sanitary Authority*, High Ct., Ch. Div., 13 February.

COMPANY.—*Contributory—Shares issued as fully paid up—Notice—Principal and Agent.*—Application by the official liquidator to settle the executors of M. on the list of contributories of the Halifax Sugar Refining Company in respect of 1200 shares transferred to him on January 31, 1885. The shares in question were originally allotted as fully paid up to or in trust for members of the firm of S. & Co., but no contract as to their being issued as fully paid up was ever registered under sec. 25 of the Companies Act 1867. In March 1884, M., having been asked to take shares in the company, employed the head clerk of the firm in which he was a partner to investigate the financial position of the company. In the course of that investigation the clerk became acquainted with the fact that the shares of S. & Co. had been issued as fully paid up. In consequence of this investigation, M. on March 14 agreed to take a number of shares in the company, as to which no question arose in the present case. In May following, the shares issued to S. & Co., together with a number of other securities, were charged to M. Brothers, of which firm M. was a member, as security for an advance of £30,000; and on January 31, 1885, the shares in question were by arrangement transferred into the name of M. *Held* (by Lords Justices Lindley, Lopes, and Kay, affirming judgment of Mr. Justice Stirling), that though M. himself might not have had knowledge that the shares were not fully paid up, yet his agent's knowledge must be imputed to him, and his executors had been properly put on the list of contributories.—*Re Halifax Sugar Refining Company*, Court of Appeal, 13 February.

DIVORCE.—*Custody of children—Misconduct on part of petitioner.*—In 1888, in an undefended suit, the wife obtained a decree for divorce on the grounds of her husband's adultery and cruelty, and the custody of the children, a boy and a girl, was given to the petitioner; but she took no step to enforce the order with respect to the boy, who always remained in the custody and control of the respondent. The decree was in due course made absolute, and on the 18th February 1889, an order, by consent, was made for the payment of £75 a year by the respondent to the petitioner for her maintenance. In December 1890 the respondent filed a notice of motion, which was duly served upon the petitioner, asking that the order for custody should be rescinded, and also that the order for maintenance should be either varied or rescinded. The motion was, by consent, adjourned over the Christmas vacation, and on the 13th January in the present year, Sir Charles Parker Butt ordered the whole matter to be referred to one of the registrars of this division for inquiry and report. The registrar found that the petitioner was not a fit and proper person to have the custody of the child Maud, and he reported that he considered it would be for the said child's benefit that she should be entrusted to the custody of her father, who had married a lady in no wise connected

with the divorce proceedings, and who was vouched for by several deponents as a person who might safely and properly be entrusted with the custody of a child of either sex. The registrar, however, did not feel justified in recommending that this should be done, in view of the practice of the Court in such cases, and of the absence of authority. The petitioner was not represented before the registrar, nor upon this motion. Mr. Justice Jeune, being satisfied that the petitioner was a person unfit to retain the custody of the child, and that the best thing to be done in the interests of the said child, was to hand her over to her father, rescinded the original order for custody, and made a fresh order, giving the respondent the custody of the children. He, however, in the absence of evidence to show that the allowance of £75 a year was, in fact, more than one-third of the joint income of the petitioner and respondent, declined to vary or rescind, upon motion, the order for maintenance.—*Will v. Will*, High Ct., P. and D. Div., 17 February.

COMPANY.—*Winding-up—Memorandum of Association—Signature—Registration—Companies Act 1862 (25 & 26 Vict. c. 89), secs. 6 and 18.*—The A. Company was registered in 1888 for the purpose of carrying on the business of company promoters. In 1889 it brought out the B. Company. In October and November 1890 the company passed resolutions for a voluntary winding-up, and appointed a liquidator. On the 6th November 1890 the winding-up was ordered to be continued under the supervision of the Court. This was a petition by the B. Company, claiming to be creditors of the A. Company, asking that the A. Company might be ordered to be wound up compulsorily. The evidence disclosed that the memorandum of association of the A. Company purported to be signed by seven persons, including Albert Moore, whereas the evidence tended to show that Moore had signed twice, once in his own name and once in another. The actual number of subscribers to the memorandum being thus reduced to six, the question arose whether the Court had jurisdiction to wind up the so-called company, sec. 6 of the Companies Act 1862 requiring that a company subject to the provisions of that Act must consist of at least seven persons. *Held* (by Mr. Justice Kekewich), that the certificate of registration (sec. 18 of the Companies Act 1862) cannot be treated as conclusive of the fact that seven persons signed the memorandum of association; that the company was not incorporated under the Companies Acts, and the petition must be refused with costs.—*Re National Debenture and Assets Corporation Limited*, High Ct., Ch. Div., 19 February.

NAVY.—*Discipline—Desertion—Resignation—Naval Discipline Act of 1866 (29 & 30 Vict. c. 109), secs. 19, 87—Naval Discipline Act of 1878—Naval Regulations 210 and 211, 1906.*—This was a rule nisi for a *habeas corpus* on behalf of a naval officer, to show cause why he should not be brought up before the Court and discharged from custody. In this case the question raised was, whether a naval

officer, who leaves the service without his resignation being accepted by the Admiralty, is liable to a charge of desertion under the Naval Discipline Act. The application in the present case was on the part of an engineer of the Royal Navy for a writ of *habeas corpus* to the captain of Her Majesty's ship, on board which the applicant was detained in custody to take his trial by naval court-martial on the charge of desertion, for his discharge from such custody, on the ground that his name was not borne on the books of any ship of Her Majesty in commission, and that therefore he was not subject to the Naval Discipline Act. *Held* by Mr. Justice Cave, and Mr. Justice Lawrance, came to the conclusion, under the circumstances, that the writ must go.—*Re Hearson*; High Ct., Q. B. Div., 20 February.

COMPANY. — *Winding-up* — *Liquidator* — *Negligence* — *Trustee or agent*.—The plaintiff was a shareholder in a company. The company was voluntarily wound up by a resolution passed in 1888, and a new company for the same purposes was registered in 1889. Under the reconstruction scheme the plaintiff was entitled to have certain shares in the new company. The shares in the new company rose in value, and subsequently fell, the liquidator not having in the meantime handed over to the plaintiff his shares. The plaintiff brought an action against the liquidator claiming damages for his delay in delivering up the shares, it being contended that the liquidator was in the position of a trustee for the plaintiff. There was no fraud or *mala fides*, or wilful refusal to deliver up the shares on the part of the liquidator, but, in the view of the Court, merely a mistake. *Held* (by Mr. Justice Romer), that the liquidator was not a trustee for the plaintiff in such a sense as to make him liable in damages for negligence apart from personal misconduct, but rather the agent of the company for distributing the assets.—*Knowles v. Scott*, High Ct., Ch. Div., 20 February.

BANK.—*Account opened by promoters of an Exhibition—Overdraft—Liability of promoters*.—In April 1888, six gentlemen, desirous of promoting a proposed Irish Exhibition in London, opened an account at a bank in the name of, and as representing, the Council of the Exhibition. One of these gentlemen acted as honorary secretary to the Exhibition, and wrote a letter to the bank, sending the signatures of the six gentlemen "authorised to draw upon the account of the Council of the Irish Exhibition," and stating that two signatures on each cheque, in addition to his own, were necessary. The account was opened, and overdrawn almost immediately. The Exhibition was not incorporated at this time, but in June 1888 it was registered as a company. As the account remained considerably overdrawn, the bank required some security, and a correspondence followed. In one letter the bank desired to be furnished with a personal guarantee of the members of the Council. The Exhibition having gone into liquidation, the bank sought to make the six promoters personally liable for an overdraft of about

£4000. Mr. Justice Kekewich held that, as the bank looked primarily to the money subscribed by the public for the repayment of their advances, and did not, at the time when the account was opened, contemplate the personal liability of the promoters, these gentlemen could not be made personally liable for the overdraft. *Held* (by Lords Justices Lindley, Lopes, and Kay), that by the opening of the account and the overdraft, which at once took place, the ordinary relations of debtor and creditor must be presumed to have been established between the bank and the gentlemen by whom the account was opened; that it had not been shown that the bank intended to give credit to the Exhibition only; and that these gentlemen were therefore jointly liable for the overdraft.—*Coutts & Co. v. the Irish Exhibition in London*, Court of Appeal, 26 February.

MARRIED WOMEN.—*Costs—Arrears of income—Anticipation—Married Women's Property Act 1882.*—An action was brought in 1867 for the administration of the estate of a testator, under whose will a married woman was entitled to a share of the income for life, with restraint upon anticipation. A summons was, in February 1890, taken out by the married woman against the trustees of the will. On the 16th July 1890 this summons was dismissed with costs against her. The order limited execution to separate property of the married woman not subject to any restraint. A summons was then taken out by the trustees for liberty to retain the amount of such costs out of certain income in their hands which had accrued after the issue of the summons, but previous to the date of the order. It was argued on behalf of the married woman that the income, having been received since the date of the issue of the summons by her, was subject to restraint upon anticipation, and, upon the authority of *Re Glanville; Ellis v. Johnston*, 31 Ch. Div. 532, could not be retained by the trustees. *Held* (by Lords Justices Lindley and Kay), that the date of the order in the action was the date to be looked at; that the present case differed from *Re Glanville; Ellis v. Johnston*, which was not a case under the Married Women's Property Act 1882, that the property sought to be charged in the present case was property such as the married woman herself could have validly charged at the date of the order, and that therefore it was chargeable with the costs of the trustees.—*Cox v. Bennett*, Court of Appeal, 26 February.

DAMAGE.—*Collision—Mersey Docks and Harbour Board—County Court—Costs—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), sec. 3—County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), sec. 4.*—By sec. 3 of the County Courts Admiralty Jurisdiction Act 1868, "Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes): (3) As to any claim for damage to cargo, or damage by collision—any cause in

which the amount claimed does not exceed three hundred pounds." By sec. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869, "The third section of the County Courts Admiralty Jurisdiction Act 1868 shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds." The plaintiffs' ship the *Z.* was damaged whilst in a dock belonging to the Mersey Docks and Harbour Board, by the negligence of their officials. The plaintiffs claim £220. The plaintiffs sued the Dock Board in the Admiralty Division to recover this amount. Mr. Justice Butt gave judgment for the plaintiffs, but refused to give them any costs, holding that the damage complained of was damage to a ship, "by collision or otherwise," within the meaning of sec. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869, and therefore that the action could and ought, in the circumstances, to have been brought on the Admiralty side of the County Court.—*Turner v. Mersey Docks and Harbour Board*, High Ct., Adm. Div., 26 February.

PRIVATE DOCUMENT.—*Report on mining property—Limited publication—Injunction.*—K., a mining engineer, having made a report of a mining property in Hungary, agreed with D., who was interested in the formation of a proposed company, that D. might print the report and show it to a syndicate. It was also agreed between them that, if the syndicate determined to proceed, and published the report, or otherwise made use thereof, K. should be paid therefor £1000; but that, if the foundation of the company was not proceeded with, the report should be returned to K. D. had 100 copies of the report printed, and given to some members of the syndicate and one or two others. The formation of the company was subsequently abandoned. A new company then took up the property, obtained a copy of the report, and made use of it in the prospectus. K. brought an action for an injunction to restrain the publication of his report, and for an inquiry as to damages. *Held* (by Mr. Justice Romer), that, under the circumstances, the report remained the property of K.; that there had been no such publication of it with his authority as to disentitle him to the injunction claimed, and also to an inquiry as to damages.—*Kenrick v. The Danube Collieries and Minerals Company Limited*, High Ct., Ch. Div., 27 February.

SHIP.—*Voyage—Deviation from course.*—In December 1889, the steamship *Llandaff City*, belonging to the defendants, left Bristol partly laden for New York. She shipped some tin plates at Cardiff. The ship experienced some very bad weather, and repairs became necessary. The master put into Queenstown at first, and afterwards determined to return to Bristol for repair. In the Avon the ship came into collision with another ship and sank. She was afterwards raised and taken to Bristol. The tin plates were damaged by water, and were sold by auction. The shippers of the tin plate sued the shipowners for damages for fail-

ing to deliver the cargo in New York according to the bill of lading. The case was tried before a judge and special jury, and the verdict and judgment were for the defendants. The plaintiffs applied for a new trial. It was contended on their behalf that the master should have had the ship repaired at Queenstown or at Swansea, and should not have returned to Bristol; that the jury had been misdirected; and that the verdict was against the weight of evidence. *Held* (by Lords Justices Lindley, Lopes, and Kay), that the return to Bristol was not such a deviation as could not be held to be reasonably necessary; that it was not necessary to communicate with the cargo owners before returning to Bristol; that the question of reasonable necessity was not for the jury; and that the verdict should not be disturbed.—*Phelps, James, & Co. v. Hill & Co.*, Court of Appeal, 28 February.

MASTER AND SERVANT.—*Agreement by servant to "give the whole of his time" to the business of his master—Injunction to restrain servant from entering into a rival business.*—The plaintiff company was incorporated in 1883 for the purpose of working a patent process for carbonisation of coal and coal shale, and the treatment of coal-gas for obtaining benzole, solvent naphtha, and the like. In 1885, the defendant, who had a special knowledge of the business so carried on by the company, entered their service for five years as manager of their works, under an agreement dated in September 1885. In 1889, when the term of five years was about to expire, a further agreement, dated July 1889, was entered into. It recited the original agreement, which was varied by extending the term of management to one of ten years from September 1885. It was expressly provided by the agreement that the manager should "give the whole of his time to the company's business," he should give due diligence to the performance of his duties, and should conform to the reasonable requirements of the board of directors, and he should reside within two miles of the company's works. In January 1891 it came to the knowledge of the plaintiff company that the defendant had entered into a scheme for establishing, in the immediate neighbourhood of the plaintiff company's works, a rival manufacturing company for the carbonisation of coal under the same process as that in use by the plaintiff company, of which rival company the defendant was to be a director, and was to invest a large sum as capital therein. Thereupon the plaintiff company commenced an action against the defendant, and a motion was made for an injunction to restrain the defendant from setting up any business, or entering into any agreement, or making any engagement with any person or company (other than the plaintiff company), by which the whole of the defendant's time would cease to be devoted to the business of the plaintiff company, or by which the defendant would be prevented from carrying out the agreement of July 1889, and in particular from assisting in the formation of, and from becoming a director, manager, or agent of any company or partnership, then or thereafter to be formed for the

purpose of carrying on a similar business and manufacture to those carried on by the plaintiff company, until the hearing of the action or further order. *Held* (by Lords Justices Lindley and Kay, reversing judgment of Mr. Justice Kekewich), that as a general rule the Court would not decree specific performance of a contract of service, or grant an injunction for breach of such a contract; that as the agreement contained no negative covenant by the defendant undertaking not to engage in any other business, the remedy of the plaintiff was not by injunction.—*Whitwood Chemical Co. v. Hardman*, Court of Appeal, 2 March.

SALVAGE.—*Default proceedings—Boiler—Amount of award.*—The steamship *E.* was lost whilst carrying as cargo (*inter alia*) a marine boiler. This boiler was found floating in the water by five boatmen, who brought it ashore, and hauled it up on the beach above high water. The boatmen then made application to the owners of the *E.*, and also to the underwriters, for salvage, who left the boiler on the beach, and refused to entertain any claim for salvage. In these circumstances the boatmen commenced an action *in rem* in the Admiralty Division for salvage. No one appeared to the action. The boiler was sold by the marshal, and realised a net sum of £58. On the action coming on for judgment, Mr. Justice Butt awarded £50 and costs.—*The Cargo ex Elephant*, High Ct., P. and D. Div., 3 March.

CHARTER-PARTY.—*Cesser clause—Demurrage at port of discharge.*—By a charter-party it was provided that the ship was to load “in the usual and customary manner a full and complete cargo of coals,” “the cargo to be unloaded at the average rate of not less than 100 tons per working day . . . charterers to pay demurrage at the rate of 4d. per ton register per diem in case of unavoidable accident or other hindrance beyond charterers’ control.” There was a cesser clause as follows: “Charterers’ liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for freight and demurrage.” In consequence of a strike at the port of loading, the ship was detained for sixteen days beyond the time in which she ought to have loaded. In an action by the owners against the charterers for this detention, the defendants relied on the cesser clause. *Held* (by the Master of the Rolls and Lords Justices Bowen and Fry), the provisions for demurrage at the port of discharge could not be extended so as to apply to the port of loading, and as the cesser clause only referred to liability “under this charter-party,” it afforded no defence to the action.—*Clink v. Radford & Co.*, Court of Appeal, 3 March.

TRADE MARK.—*Colourable imitation—Injunction.*—Action to restrain the defendants from passing off their goods as the goods of the plaintiffs, and from infringing the plaintiffs’ registered trade mark. The plaintiffs’ manufactured a sauce known as “Yorkshire Relish,” which was sold in bottles bearing a label (which had been

registered as a trade mark), and a covering slip over the stoppers of the bottles. The label was coloured red and blue. At the top of the label was "The celebrated," and below in large type "Yorkshire Relish." In the centre of the label was a blue willow pattern plate, under which was written "Trade mark registered." On either side of the plate were tablets stating for what the sauce was intended, and at the bottom was the plaintiffs' name and address. The label had been in use over twenty-six years, and the sale of the plaintiffs' sauce had been very extensive. The defendants manufactured a sauce called "Castle Relish," which they sold in bottles of the same size and shape as the plaintiffs', bearing a label and a covering slip. The label was also coloured red and blue. At the top of the label was "The celebrated," and underneath "Castle Relish." The central device was a castle in red, on each side of which was a tablet similar to the plaintiffs', and at the bottom was the defendants' name and address. The blue portion of the label had formerly been light, but had afterwards (before any complaint had been received from the plaintiffs) been altered to a dark bronze blue. An application to register this label as a trade mark was pending. *Held* (by Mr. Justice Stirling), that the defendants' label was not so similar to that of the plaintiffs' as to be calculated to deceive; there were undoubtedly resemblances, and it was difficult to suppose that the defendants' label had not been designed by a person who had before him, or at least present to his mind, the plaintiffs' label; it was not, however, shown that the resemblances were introduced for the purpose of passing off the defendants' goods as the plaintiffs', or that any one had in fact been deceived; the differences were so marked that even an unwary person could hardly be misled, and the action must therefore be dismissed.—*Goodall v. Wilkinson*, High Ct., Ch. Div., 5 March.

COMPANY.—*Memorandum of Association—Alteration of provisions of—Confirmation by the Court—Opposition of debenture stock-holders—Companies (Memorandum of Association) Act (53 & 54 Vict. c. 62), sec. 1, sub-secs. 1, 5; sec. 2.*—A petition was presented by a company, under the Companies (Memorandum of Association) Act 1890, for the confirmation by the Court of a special resolution altering the provisions of its memorandum of association. The company was incorporated in 1871 with a nominal capital of £1,000,000, and its memorandum of association stated its objects to be to receive money on deposit at interest, and to invest the money received from payments on shares in the stocks or obligations of British, Foreign, or Colonial Governments, provinces, or municipalities, or of railways or other public undertakings guaranteed by any British, Foreign, or Colonial Government, State, province, or municipality, provided that not more than one-tenth part of all the money invested should be invested in the stocks or obligations of any one Government, State, province, municipality, railway, or undertaking; to undertake the formation of and work trusts similar to the Foreign and Colonial Governments' trust, and

to do all such other things as were incidental or conducive to the attainment of the above objects. By the special resolution now sought to be confirmed, it was resolved, in effect, that the objects of the company should be extended by giving it power to also invest in or upon mortgages, debentures, stocks, and shares of any corporation, company, or undertaking at home or abroad, and in or upon stocks of any trust or investment company or corporation. At the date of such resolution, the capital of the company consisted of £374,260 preferred stock, £374,260 deferred stock, £1480 stock (as yet not divided into preferred and deferred), and £250,000 representing unissued shares. The only creditors of the company were the holders of debenture stock, to whom the company were indebted in the aggregate amount of £438,870, and depositors to the amount of £78,363. The main purpose of the company was stated to be to invest its capital and other moneys in such a way as to spread the same over a number of different stocks, shares, and securities, and thereby obtain a fairly uniform average rate of interest. Certain debenture-holders opposed the petition, on the grounds that the resolution proposed to vary the conditions on which the debenture-holders originally advanced their money, and would entirely change the original character of the company. They contended that the debenture-holders were entitled to be paid off or otherwise secured, and that the Court ought not to dispense with their consent. *Held* (by Mr. Justice Chitty), that the main purpose of the company not being to invest its funds generally, but to invest in Government stocks, using the word Government in its extended sense, the case did not come within sec. 1 of the statute at all; but that, even if it did fall within that section, the resolution ought not to be confirmed, as the debenture stock-holders had taken their stock on the faith that this was a Government investment company, and they were entitled to say that the company should not be turned against their will into an *omnium* investment company; therefore, that, notwithstanding the considerable majority of debenture stock-holders who were in favour of the resolution, it was the duty of the Court to refuse to confirm the resolution, not merely at the instance of the debenture stock-holders who opposed, but at the instance of those who did not appear, and who had left the matter to the care of the Court. The petition was therefore dismissed with costs.—*Re The Government Stocks Investment Company Limited*, High Ct., Ch. Div., 5 March.

PRINCIPAL AND AGENT.—*Ratification—Liability for rent—Adoption of contract—Quantum meruit.*—The Corporation of the Albert Hall sued W. and her son, under an agreement dated April 17, 1889, for the balance of rent of the Albert Hall, and expenses of a *fête* held there in June 1889 by a society called the Thimble League, of which W. was the president. The agreement was entered into by H. "on behalf of the Thimble League." The Thimble League was not an incorporated society, and H. was not a member of it, and had no authority to bind the members of the League as a whole; but at

a meeting of the League on March 30, 1889, at which W., being abroad at the time, was not present, but her son was, it was resolved that the League should pay H. £200 for out-of-pocket expenses, and that he should "organise a fête" at the Albert Hall. W. had given her son some authority to act for her, but the scope of his authority was disputed. W. took part in the fête, and got people to take stalls thereat. The case was tried before a judge and jury, who found a verdict for the plaintiffs. The defendants moved for a new trial. *Held* (by Lords Justices Lindley, Bowen, and Kay), that the judge should have directed the jury to find a verdict for W.'s son, but that, as regards W., even assuming she neither authorised nor ratified the agreement of April 17, 1889, there was sufficient to render her liable on a *quantum meruit*, and the verdict should not be disturbed.—*Corporation of Hall of Arts and Sciences v. Dowager Countess of Winchilsea*, Court of Appeal, 9 March.

EXTRADITION CASE.—*Application for writ of habeas corpus—English and Belgian law—Evidence of prisoner's wife, and evidence not on oath, taken in Belgium—Extradition Act 1870 (33 & 34 Vict. c. 52), secs. 10 and 14.*—The prisoner was committed in England on a warrant charging him with offences against the Bankruptcy Law, and with obtaining goods by false pretences; he was convicted in Belgium of similar offences now charged *par contumace*, but having recently come to this country, the Belgian Government desired his extradition with a view to his trial in Belgium. The depositions or statements had been taken in Belgium by the *Juge d'instruction*, and the police authorities were sent over to this country with the warrant from Belgium for the offences charged; the magistrate at Bow Street Police Court granted an English warrant, on which the prisoner was now under arrest. It appeared from the copies of documents produced, that one or two of them purported to have been taken on oath, while others did not, and one of them was a statement of the prisoner's wife. On a motion for a writ of *habeas corpus* for the discharge of the prisoner, it was contended on his behalf that there was not sufficient evidence against the prisoner upon either of the charges made, much of the evidence being mere hearsay, part of it being evidence of the prisoner's wife, and some of it not appearing to have been taken upon oath. *Held* (by Mr. Justice Cave and Mr. Justice Grantham), that, as to the evidence of the prisoner's wife, it appears that sec. 14 of the Extradition Act enables the Court here to make use of "depositions or statements on oath taken in a foreign State, or copies duly authenticated." As to the statements or depositions not being upon oath, it does not appear that they were not so taken. The regularity of proceedings of Courts of justice ought to be presumed. All the merits being against the prisoner, a *habeas corpus* for his discharge ought not to be granted.—*Ex parte Jean Baptiste van Inthondt*, High Ct., Q. B. Div., 13 March.

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Editorial.

The late Lord Mure.—"Out of sight, out of mind," is a saying only too apt to be true in the bustle and business of the Law Courts; and we have known of an instance of a retired judge sinking out of recollection by practitioners so completely that, when he came to die, some were known to exclaim that they thought he was dead years ago. Very different was it in the case of Lord Mure. The announcement of his death last month brought regret to every member of the Scottish legal profession, scattered throughout Europe as they were at the time. It would be impossible to give better expression to the respect in which the deceased judge was universally held, than by quoting the remarks of his colleague and friend, the Lord President, on the occasion of Lord Mure's retirement:—"My Lords, since we last sat in this Court we have been deprived, by the resignation of Lord Mure, of the counsel and aid of one of the most able and valued of our colleagues. It is a great loss; but there may be some consolation in reflecting that he leaves behind him nothing but sweet and pleasant memories. It has been his fortune to fill in succession almost all the most prominent offices connected with our profession. As Sheriff, Solicitor-General, and Lord Advocate he had an opportunity of displaying his talents and capacity; and it may be truly said he made many friends and no enemies. He has been engaged for nearly twenty-five

years in the administration of justice as a judge of this Court, much to his own honour and credit, and greatly to the advantage of the public service. He will long be remembered, not only for his ability and accomplishments as a lawyer, but also because on all occasions, and in all circumstances, he proved himself to be a high-minded, upright, and honourable gentleman."

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London Lawyers and Scottish Private Bills.—For the edification of those who admire fairness and closeness in argument, we elsewhere reprint from the *London Law Times* an article on "The Scottish Private Bill Legislation Bill." It cannot fail to amuse readers in Scotland. The article follows pretty closely the lines of a letter by a certain Q.C., to which we recently called attention, and it has a strong flavour of the bad temper of that epistle. The Bill now before Parliament is pronounced "a measure revolutionary in character, and yet introduced by the present Constitutional Government." "The present Bill is a bad one, and based upon a bastard Home Rule; and we can only wonder that it should have obtained the support of Her Majesty's Government." There is a fine specimen of audacity in the attempt made to explain away the undoubtedly wide and strong expression of public support given to the Bill. "The various public and local bodies have indeed declared unanimously in its favour. But it is said by those who know, that the private opinions of the individuals composing those bodies are strangely at variance with their public utterances. Whilst professing to support the Bill warmly as only justice to Scotland, many of them declare in private that the present state of things is much to be preferred to the new proposal." This is an unwarrantable slander on the members of Scottish public bodies, and the persons alluded to as "those who know" must have imposed on the simple writer of the dispassionate article in question. The said writer goes one step beyond Mr. Littler's letter. He admits that the Scottish Bar "will gain directly by it." The irate Q.C. in his letter said no. The Scottish Bar were deluding themselves. There would only be an increased demand for Messrs. Littler & Co., and their terms were up.

But in the *Law Times* we find this admission—and the admission is the explanation of much! Before quitting the subject, we would call attention to an example of the close logic of the article. It is stated, as an objection to the Bill, that “the present decisions are unbiassed and fair; in Scotland they must be tinged with local prejudices”—which is a begging of the question quite worthy of the London Parliamentary Bar.



First Offences.—What will appear to most people, as it appears to us, to be a salutary change, has been introduced into the administration of the criminal law of France. Henceforward an important distinction will be drawn between first offenders and those who have committed previous offences. In the case of the former, the prisoner who is found guilty will be sentenced according to the nature of his crime. The sentence, however, will not take effect as matter of course. The execution of it may, in the discretion of the Court, be postponed; and should the offender conduct himself properly, and keep void of offence for five years following such sentence, he will thereby avoid the punishment. Through his maintaining a clear record during that period, his sentence, as it were, will prescribe. On the other hand, should he again offend during this probationary five years, he will not only undergo a new punishment for the new crime, but his former sentence will also revive, and he will have the double penalty to suffer. This innovation must commend itself as wise and humane. Its results cannot fail to be beneficial to the unfortunate and comparatively harmless section of the class of first offenders. The proposal is based on, is a practical recognition of, the fact that a first offender is not necessarily a member of the criminal class, and has not the makings of a habitual criminal in him if he but get a chance of retrieving his unwary step. Accident often is the explanation of his crime. In France such a person will have a chance of mending his ways. He will be rescued from the indelible disgrace and blemish of the gaol; and, even if his moral principle is somewhat weak, he will have a powerful inducement to correct his way of life in the prospect held out to him of altogether avoiding the

execution of his sentence. In this country we shall have the privilege of studying the operation of the reform as it works in France. If success attend it, then we ought to follow a similar course ourselves. At present we certainly do not err by an excess of enterprise in these matters.

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Resignation by Compulsion.—Mr. Justice Stephen has retired. In taking this step he has acted on the advice of his physicians, and not in deference to the unseemly scolding of the London *Law Times*. It must have been a rude awakening to the London press to learn that even a judge, so far from taking his opinions from the bubbling fountain of its wisdom, and guiding his life by a daily study of its preternatural sagacity, does not even read it, and is in utter ignorance of its contents. What a blow for the directors of "public opinion"! But the soul of the *Law Times* is unrefined by any ordinary feeling of delicacy. A parting growl has escaped it, to betray its true nature, and this is the said growl:—"Mr. Justice Stephen has closed his judicial career, full of useful and laborious work, by a farewell to the Bar. The occasion was one calculated to excite much interest, but interest of rather a morbid character. It is unnecessary to refer to what the Attorney-General said, or to what Sir James Stephen said. But once more we are concerned to inquire the object supposed to be served by these painful public severances of the connection between the Bench and the Bar. Few judges can increase their reputation by passing through such an ordeal, whilst to the Bar the incident is invariably one of mingled pain and amusement."

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English Ignorance of American Law.—When Tartarin de Tarascon was making his famous visit to the Alps, he was shocked to mark the ignorance of certain people to whom his name conveyed no meaning! Not to know him was to argue oneself unknown. The *New Jersey Law Journal*, most Englishmen will think, has a similar experience, and for a similar cause. How can an English judge be expected to know any-

thing of American law? "Another curious instance of English ignorance of American law," writes the journal in question, "is found in a recent opinion of Justice Butt in a case in Admiralty, *The Avon and Thomas Joliffe*, L. R. 1891, p. 8. When counsel contended that the principle of dividing the damages between two vessels to blame for a collision had long been followed in the United States, the judge said: 'It may be that the law as administered in the United States, *or in some particular State of the Union*, allows the recovery of damages in the manner contended for.' One would have thought the learned judge would have known that Admiralty law was administered by the Federal Courts, and not by those of any particular State. The case is an illustration of the fact that Admiralty law as administered in the United States is the general Admiralty law and not Admiralty as limited by the Courts of the mother country." Our contemporary asks too much. It ought to be content with the fact that the learned judge was aware of the existence of the United States. It is not consonant with the dignity and spirit of English law to be seriously acquainted with other systems, or to be influenced by positive or *à priori* jurisprudence.



The Jackson Case.—For our sins this case—or rather the commentaries and moralisings thereon—has been inflicted on us. One of the themes in the limited *repertoire* of the so-called comic papers, and those who jest for profit or reputation, is the domestic relations. Wherefore, the acres of print which have followed on the decision in this case might have been expected on the part of the daily press and the so-called comic papers aforesaid. As to the shower of *réchauffés* of treatises on husband and wife which have helped out the legal magazines, we ought not to complain, but to endure them contentedly. It is satisfactory to find so sensible a letter as the following addressed to the *Irish Law Times*, and we reproduce it accordingly:—

"SIR,—I think there has been a great deal of unnecessary excitement over the late case of Mrs. Jackson. A decree for the restitution of conjugal rights can, I presume, be enforced

in the usual way by the Court which issued it. All that has been decided in Mrs. Jackson's case is that the plaintiff in such a suit cannot take the law into his own hands, carry off the defendant by force, and imprison her in his private house as long as he thinks proper. If the husband ever had the right of doing this without the authority of the Court, there would have been no necessity for any such action as a suit for the restitution of conjugal rights. The very basis of that kind of action is that neither party has the right to carry off the other by force and imprison him or her.

"Mr. Jackson might have made a motion to have his wife committed for contempt of Court, and, if a proper case had been made, I presume an order for her committal would have been made. But the nature and duration of her imprisonment would have been fixed by the Court, instead of being left to the absolute discretion of her husband.

"As to the right of beating or imprisoning a wife mentioned in the old text-books, I do not think there is any reported case in which a wife sued her husband for beating or imprisoning her, in which the decision was that he was justified in doing so. But even if moderate chastisement or confinement would not under ordinary circumstances be regarded as cruelty, I suspect there never was a time when the forcible seizure of a wife who was living apart from her husband with the object of beating or imprisoning her would not have been regarded as cruelty. There is a difference between a wife who misconducts herself in her husband's house, and one who only wishes to keep away from him and to be let alone. Had he ever the right of seizing, beating, or imprisoning the latter? I think not.—Truly yours,

"AN IRISH BARRISTER."

[It may be mentioned that, in the P. & M. Div., on the 7th inst., during the hearing of an application in the matter of a petition by James Haynes for restitution of conjugal rights, Justice Warren observed that Jackson's case had, in effect, turned the issuing of such decrees into a farce.—ED.]

Special Articles.

CRIMINAL ADMINISTRATION UNDER THE CÆSARS.

A MILLENNIUM and a half after the fall of Rome, the law of Rome is still more widely studied than any other system of jurisprudence in the world. The materials for such study are ample, for time has dealt tenderly with the records of the *Jus Civile*. It is as easy to ascertain what was the Roman law on a particular point in 50 A.D., as to ascertain the state of the law of England upon the same subject in 1750 A.D. But whilst our acquaintance with the development, the principles, and the positive rules of the Roman law is minute and exhaustive, our knowledge of the practical working of their legal system under the empire is confused and conflicting. On the one hand, we find the noblest system of jurisprudence the world has known permeated by principles whose inherent righteousness, force, and universality have made them the basis of all modern law. On the other hand, we find a black record of injustice, spoliation, and crime, on the part of many throughout the empire who were charged with the administration and enforcement of the law. When we have regard to the former, we pronounce it a system which would not be administered but by upright and honourable men. When we look to the latter, we are at a loss to imagine how men, capable of such acts, could have found any use for such a system of jurisprudence, any sphere for its administration, any opportunity of applying or enforcing it. It is clear that no great system of jurisprudence can be administered by judges who habitually set justice and morality at defiance in their administration. It is clear, too, that under such conditions no great system of jurisprudence could be developed. A scholar might indeed evolve in his retirement an ideal scheme of politics or law, but no such eminently practical body of law as that of Rome could have been evolved unless the rules which are there developed had been in daily practical application in the Courts of the

empire. No one who reads the authentic records of the corruption of society and the demoralisation of the governing classes throughout the empire, can well credit it, that, amidst all this seething iniquity, law and justice were fearlessly and impartially administered. But the *Jus Civile* remains as an irrefragable record that law and justice were not only studied, but were conscientiously administered in the Imperial Courts. The explanation probably is, in part at least, that the Roman law was too strong to yield even in the hands of corrupt administrators. Individual acts of iniquity were committed, but the great principles of law had so permeated the whole administrative system of Rome that even private depravity felt its sway, and men of infamous lives administered the law in the main with justice and integrity.

The law remains to us. The records of the social corruption abound. For the reconciliation of the two, the materials are not so plentiful. The acts of hideous wickedness by a Tiberius or a Nero have been amply recorded. But we know that even under these despots the Roman citizen knew no higher privilege than the appeal to Cæsar. What we don't know is how it exactly fared with a prisoner who took such an appeal, what sort of consideration his case received, what facilities for defence were afforded him. The truth probably is, that in the case of any ordinary citizen who had incurred no imperial censure, his appeal to the most infamous of the Cæsars received as fair and impartial a hearing as does any appeal from one of our own Colonial Courts to the Queen in Council. But of the daily administration of the law, the treatment of ordinary cases, the records which remain are scanty. There were no daily papers in those days, there was no Rottier or Dunlop, and ordinary people did not write autobiographies. There is, however, a remarkable record of the treatment received at the hands of Roman law by an obscure provincial, who more than once found himself in contact with the Roman Courts. Save for a few details, the most negative criticism does not dispute the strict accuracy of the narrative of the journeys of St. Paul recorded in the Acts of the Apostles, and there we find one or two most graphic pictures of the ordinary daily administration of Roman law by provincial authorities.

When Paul was in Corinth (about 53 A.D.), Lucius Junius Annaeus Gallio was Proconsul of Achaia. Gallio was the brother of Seneca and the uncle of Lucan, and he enjoyed a social popularity among the best Romans of his time, which shows him to have been endowed with a singular grace and refinement of soul. To his contemporaries he was known as "*dulcis Gallio*," and his name seldom occurs without this prefix. To him Seneca dedicates his *De ira* and his *De Vita Beata*, and of him he says: "*Nemo mortalium unitam dulcis est quam hic omnibus*;" and again, "*Gallionem fratrem meum quem nemo non parum amat etiam qui amare plus non potest.*"

Such is the man whom centuries of pulpit eloquence have taught the world to regard as the grand example of religious indifferentism, and whose very name has become proverbial for cynical worldliness. Gallio had recently been appointed Proconsul, and probably the Jews imagined that he would not be unwilling to conciliate a community so wealthy and influential as the Hebrews of Corinth. Accordingly, having raised a tumult, they suddenly seized Paul, against whom their animosity had been inflamed, not so much by his doctrines as by his forsaking the synagogue and preaching to the Gentiles, and dragged him to the judgment hall before the curule chair of the Proconsul.

The charge against Paul was a peculiar one to bring before a Roman judge, viz. that he persuaded men to worship God in a manner contrary to the Mosaic law. What did this charge mean? Judaism was a *religio licita*: the State licensed and recognised it. But the State had not recognised the variety of Judaism called Christianity, and accordingly, as the Jews represented, it was a *religio illicita* running counter to the recognised Roman law. It was just in fact as if the Mussulmans in a town in Bengal were to drag one of their own race accused of defection from orthodox Mohammedanism before a British magistrate.

The mere statement of the charge was enough for Gallio, who probably detested the Jews as much as did his brother Seneca, and who was doubtless disgusted by the tumultuous hubbub of the fanatical mob. The accused was not called upon. Before Paul could open his mouth, Gallio disposed of

the matter in words which may be freely rendered as follows: "If this were a matter of civil wrong or a proper criminal charge, certainly I would hear the case; but if, as appears, it is a matter of words and names and your law, you must settle that for yourselves, I shall be no judge of such matters. Lictors, clear the Court."

Such is the record of St. Paul's appearance before Gallio. The Greeks provoked by the bigoted fanaticism of the Jews took advantage of their repulse to seize Sosthenes, the chief ruler of the synagogue, and thrash him before the very judgment hall. Gallio cared not. Such scenes were common in towns frequented by Jews, and the horseplay of the Greek *gamins* distressed the haughty governor no more than would the mobbing of an offensive Jew by an Armenian crowd disturb the serenity of a Turkish Pasha.

In the opinion, apparently, of preachers and commentators, Gallio, when Paul was brought before him, ought for his own edification to have made a particular inquiry into the peculiar tenets of the wretched Jew thus dragged into the Court; and his name has been made a by-word because he failed to do so. It would be as reasonable to blame a British magistrate in Southern India for not investigating, with a view to his own personal salvation, the peculiar tenets of a native dragged before him as an innovator upon the worship of orthodox Parseeism. For our purpose, however, it is more important to remark the ready accessibility of justice, even of the justice seat of the great Proconsul, to all complaints, the frank assurance which the Proconsul gave, that any just demand for redress even from the detested Jews would not be made in vain, and the strong sense and clear judicial insight which enabled Gallio at once to appreciate the preposterous character of the present complaint.

The next Roman in authority with whom we find Paul in contact is Claudius Lysias, the military commandant at Jerusalem. A tumult having arisen in the Temple, and Paul being in immediate danger of death, he was rescued by Lysias with a strong force and carried into Fort Antonia. The fury of the mob being unbounded, and the charges uttered in a foreign tongue being unintelligible to him, Lysias, who supposed his prisoner to be a political desperado, made the cruel

but strictly legal order that he should be examined by scourging, to extort from him the truth with reference to the charges made against him. But the prisoner pleaded his citizenship as a Roman, the privilege was instantly recognised by Lysias, and the torture was countermanded. On the following day, Lysias brought Paul before the Sanhedrin in order that an inquiry might be held; but the proceedings were broken up by another fanatical outbreak, and only the promptness and resolution of Lysias, and the force of the legionaries, saved Paul from being torn in pieces. A conspiracy was soon formed to induce Lysias again to bring Paul before the Sanhedrin, and to assassinate him on the way. Fortunately, news of this design reached the ears of Lysias. Human life was of small account at that time, scenes of bloodshed were common in the streets of Jerusalem in those days, and this conspiracy might have seemed to afford an easy opportunity of getting rid of a troublesome prisoner. But not so thought Lysias. Decisive steps must be taken to save Paul, and at the dead of night 470 Roman soldiers rode thirty-five miles to Antipatras as an escort to protect this obscure Jew from the violence of his fellow-countrymen. The letter which Lysias sent with the prisoner to Felix the Procurator is an excellent example of the elogium or the abstract of a criminal charge, which it was customary for Roman authorities to send in submitting a prisoner to the cognisance of a superior judge. "Claudius Lysias unto the most excellent Governor Felix, greeting,—This man was seized by the Jews, and was about to be slain by them when I came upon them with the soldiers and rescued him, having learned that he was a Roman. And desiring to know the cause wherefore they accused him, I brought him down unto their Council, whom I found to be accused of questions of their law, but to have nothing laid to his charge worthy of death or of bonds. And when it was shown to me that there would be a plot against the man, I sent him to thee forthwith, charging his accusers also to speak against him before thee. Farewell."

The Governor Felix, before whom Paul was now carried, has been described as a Borgia of the first century. By birth an Arcadian slave, he had risen through a long series of plots

and crimes to be Procurator of Judæa. His career in this office was signalised by many acts of violence and crime, and he even procured the death at the hand of hired assassins of Jonathan of the house of Annas, ex-high priest, and one of the leading Jews of his time. But murder was not his only heinous offence. He was an intimate friend of Simon Magus the sorcerer, and he used that man's machinations to induce Drusilla, the younger sister of Agrippa II. and the wife of Aziz, king of Emesa, to elope from her husband and unite herself with him. By Suetonius, Felix is described as "*trium reginarum maritum aut adulterum.*" One of these wives is unknown, but the third was a daughter of Juba, king of Mauritania, and the grand-daughter of Antony and Cleopatra. The conduct of Felix in the government is thus described by Tacitus: "*Antonius Felix per omnem saevitiam et libidinem jus regium servilii ingenio exercuit.*" Such was the ruler before whom, seated on the throne of justice, was now brought, accused of crime, the man whose writings have been received by the best spirits of every generation since his own as the great text-books of practical morality.

A Roman judge to whom a prisoner was sent with an elogium was required to bring him to trial, if possible, within three days. In Paul's case this was impossible, as Jerusalem, from which his accusers had to be summoned, was two days' journey distant. It was five days, therefore, after his arrival at Cæsarea that the trial of Paul began. The priests probably knew little Greek and no Latin, and accordingly they employed a professional pleader, Tertullus, to state their case against Paul. The speech of Tertullus is interesting, as being the only example of the pleading of a provincial lawyer which has come down from antiquity. The charges against Paul were three: (1) That he was a public pest, who stirred up factions amongst the Jews; (2) that he was one of the sect of the Nazarenes; and (3) that he had profaned the Temple. The first two charges seem irrelevant, the third was a capital offence by the local Roman law, but there was no evidence to support it. Even a Felix was not going to condemn a man off-hand on such a case as this, and accordingly, after hearing Paul, he adjourned the trial until Lysias should visit Cæsarea. The priests and Tertullus returned to Jerusalem.

Little did the wily provincial lawyer, as he pocketed his fee, dream that his speech of that day would be more familiar eighteen centuries later than the Philippics of Demosthenes, and would be read by millions who never heard the name of Cicero!

Felix, whose association with Simon Magus shows him to have been full of superstition, had private interviews with Paul from time to time during his captivity, but no further progress was made with the case. It was one of the defects of the Roman criminal system that, whilst the prisoner must at once be brought to trial, when this was done the trial could be indefinitely adjourned. Felix, it appears, hoped for a bribe from Paul's friends to secure his release. He might readily have got a bribe from the chief priests to deliver Paul over to them, but that he was clearly not prepared to do.

At last, in 60 A.D., Felix was recalled. He left Cæsarea in disgrace and in imminent dread of a prosecution at the instance of the Jews before Cæsar; and anxious, if possible, to conciliate these enemies, he left Paul still a prisoner. But even Felix, though he dared not incur fresh enmity by releasing Paul, did not hand him over to his enemies. Clearly the protection of Roman law counted for something even at Cæsarea.

Felix was succeeded in the Procuratorship by Porcius Festus, whom Josephus describes as an honest and upright judge. Immediately on arriving at Cæsarea, Festus proceeded to Jerusalem, where he was met by the chief priests, who besought him to deliver Paul over to be tried by the Sanhedrin. They intended, it appears, to lay an ambushade for him, and to kill him before ever he reached Jerusalem. But Festus seems to have suspected them, and accordingly he directed that Paul should be kept at Cæsarea, and that his accusers should come down there to make their representations against him. When the priests pressed him with still further insistence, he made the haughty and characteristically Roman reply:—"It is not the manner of the Romans to deliver any man to die before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him."

The trial was accordingly resumed at Cæsarea. The Jews

do not appear to have had professional assistance on this occasion, and their case was further weakened by the absence of testimony in its support. Festus was in a dilemma. He saw well that the issue was one which he could not try, and that whether Paul were guilty or not, his offence was not worthy of death. But the Romans recognised a certain authority in the Sanhedrin to try Jews for offences not cognisable by Roman law, and to inflict minor punishments therefor. (Pilate, it will be remembered, was quite willing that the Sanhedrin should deal with Jesus in this way.) Now Festus did not wish to begin his Procuratorship by quarrelling with the powerful priestly party. On the other hand, he was not prepared to deliver Paul over to the Sanhedrin with a free hand even to put him to death, which was what the priests demanded. The proposal which he made was of the nature of a compromise. "Wilt thou go up to Jerusalem, and there be judged of these things by the Sanhedrin, but under my protection?" Paul knew better than to accept this proposal. He had never received justice when brought before the rulers of his own people. He had seldom been refused it by Gentile authorities. As a Roman citizen, he had the right of appeal to Cæsar. The Procurator sat in judgment only as Cæsar's deputy, and Paul now determined to claim his privilege. Having briefly explained that being guilty of no offence against the Jews, he declined to be delivered over to them for trial, he uttered the decisive words, "*Cæsarem appello.*" Taken aback by this sudden move, Festus turned to refer to his *consiliarii*, or assessors, as to the admissibility of the appeal. But the conference cannot have lasted long, the point was too clear; and, turning again to the prisoner, the Procurator announced his finding, "*Cæsarem appellasti, ad Cæsarem ibis.*" So completely did the appeal remove the case from the cognisance of the Procurator, that, as appears, the Procurator could not subsequently release the prisoner though satisfied of his innocence. "This man might have been set at liberty if he had not appealed unto Cæsar."

Festus seems to have found some difficulty in framing an eulogium to send to the emperor with Paul. The charge against the prisoner was all but wholly unintelligible to the

Procurator. Accordingly, before despatching Paul to Rome, he took advantage of a visit of King Agrippa, the last of the Herods, to have a public examination of Paul, in order that, with the assistance of the Jewish king, he might be able to present an intelligible statement of the case to his master.

Of Paul's subsequent appearances before Roman tribunals, no authentic record remains. We know that he lived two years in Rome, in mild restraint, before he was tried. It is hardly doubtful that on his first trial before Nero he was acquitted, and that he returned to the East. But on a second occasion, persecution having broken out against the Christians, owing to the false charge of their having burned the city, Paul was brought again before Nero. One passage (2 Tim. iv. 16) suggests that even on this occasion the first verdict was "non liquet" or "not proven," and that he was put back for re-trial. "At my first defence no one took my part, but all forsook me; may it not be laid to their account. But the Lord stood by me, and strengthened me, that through me the message might be fully proclaimed, and that all the (Gentiles might hear: and I was delivered out of the mouth of the lion." But, however that may have been, unanimous tradition affirms that Paul was subsequently condemned and executed.

The whole narrative, however, amply bears out the proposition with which we started, that even in the darkest days of the empire, and in the most remote and misgoverned provinces, Roman law was a living power, and Roman justice anxiously protected individual right. There were so few noble characters among the leading Romans of the empire, and corruption and social demoralisation were so universal, that one marvels sometimes how the great empire held together so long. Roman law was probably the chief cohesive force: it was stronger than the men who administered it, and it was the great bulwark against universal anarchy. Justice in general was fairly administered, and the subject races recognised that, whilst the legions were their only protection against the barbarians since they themselves had renounced the sword, so Roman law was the only guarantee of social order at home since their own institutions had become obsolete or had altogether disappeared.

C. N. J.

THE DISHORNING OF CATTLE.

By the decision of a bench of five judges of the High Court of Justiciary, in the case of *Todrick v. Wilson*, the law of Scotland in regard to the dishorning of cattle has been of new declared to be at variance with that of England. The statutes severally applicable to the two countries are, in all respects, in similar terms. The facts on which the opposing decisions have been laid down were also, in all respects, the same. There are no side issues or specialities as the basis for either of the decisions, which therefore form two directly opposite views on the same question.

Before the case of *Todrick v. Wilson* was raised, the history of the legality of dishorning of cattle was as unsatisfactory as it is to-day. In a prosecution which was brought in Scotland in 1888 (*Renton v. Wilson*, 2 Wh. 43), the High Court of Justiciary had held that dishorning cattle did not constitute cruelty to animals under the Scottish statute (13 & 14 Vict. c. 92, sec. 1); in a prosecution in England, brought after the Scottish case, the English Court of Queen's Bench decided (*Ford v. Wiley*, L. R. 23 Q. B. D. 203) that dishorning of cattle, save for surgical purposes, was cruelty under the English statute (12 & 13 Vict. c. 92, sec. 2). As we have pointed out, these two Acts of Parliament are in similar terms. In Ireland there has been one decision either way, the more recent being in accord with the view of the Scottish judges (*Brady v. M'Argle*, 14 L. R., Ir., 174, and *Callaghan v. Society for Prevention of Cruelty to Animals*, 16 L. R., Ir., 325). With the object of having the matter reconsidered, in view of the strong opinions of the Lord Chief-Justice of England and Mr. Justice Hawkins in *Ford v. Wiley*, the Crown authorities in Scotland raised a fresh prosecution in the case of *Todrick v. Wilson*.

The complaint was at the instance of the Procurator-Fiscal of Haddingtonshire, and alleged that George Wilson, cattle-dealer, Cupar, on 20th November 1889, did, within a cattle-court at the farm steading of North Berwick Abbey, in the parish of North Berwick and county of Haddington, cruelly ill-treat, abuse, or torture, or cause or procure to be cruelly

ill-treated, abused, or tortured, thirty-two or thereby oxen, by sawing off with a saw or other instrument the horns of the said thirty-two oxen close to their skulls, whereby the said thirty-two oxen were subjected to great unnecessary and cruel pain and suffering, and were thus cruelly ill-treated, abused, or tortured, or caused or procured to be cruelly ill-treated, abused, or tortured, by the said George Wilson, contrary to the Act 13 & 14 Vict. c. 92, and particularly section 1 thereof.

At the pleading diet, objection was taken to the relevancy of the complaint in respect that it was already settled by the High Court in the before-mentioned case of *Renton v. Wilson*, that the dishorning of cattle is not an infringement of the statute. This the Sheriff-Substitute repelled, on the ground that he had no knowledge of the facts that were to be laid before him in the case, and these might differentiate it from the decided case. An elaborate proof was led, extending over three days. The prosecution naturally created widespread interest among cattle-dealers and agriculturists. There was a defence fund, and a goodly supply of practical and scientific evidence was forthcoming on each side. On the general question, two distinguished English veterinary surgeons (Professor Pritchard and Professor Macqueen, London) gave evidence for the prosecution. Principal Walley, Edinburgh, and Mr. George Young, V.S., Haddington, who saw the animals from time to time, were also called by the Crown, and submitted careful reports. These all were of opinion that the operation caused excruciating pain to the animals. For the defence, Professor Wallace, Edinburgh University; Professor Owen Williams, Edinburgh; Professor M'Fadyean; Mr. Clark, V.S., Coupar-Angus; Mr. P. J. Combe, V.S.; Mr. D. Constable, V.S.; Mr. Carruthers, V.S.; Mr. Bell, V.S.; and Mr. Andrew Hume, V.S., all gave clear and strong evidence, and considered that the suffering caused to the oxen was not great. Fifteen practical farmers and cattle-dealers, called by the Crown, all testified to their own opinion and experience that dishorning as practised in this case, viz. by the removal of the entire horn close to the skull, was unnecessary. The end in view, viz. the peaceable fattening of the animals in courts, could be equally well attained by other means. On

the other hand, about an equal number of practical men, called for the defence, gave testimony to the directly opposite effect. The Sheriff-Substitute found the respondent not guilty.

The Crown appealed to the High Court, and a case was stated by the Sheriff. The facts which he found proved were as follows :—In consequence of complaints by the cattleman in charge of the animals, to the effect that they were preventing each other from taking their food, and injuring each other, it was resolved to dishorn them. The cattle were mostly eighteen months old. They were dishorned by the respondent, with the assistance of four of the farm servants at the Abbey Farm, at the time and place libelled. Each animal was drawn by a rope to a pillar in the cattle court ; its legs were secured by straps connected by a rope, and the animal was cast upon its side upon a bed of straw. The horns were then sawn off by the respondent as close to the skull as possible with a fine tenon-saw. The skin at the base of the horn was in some cases cut with a knife after the saw had passed through the horn, and skin remained attached to it, and in some cases also the skin was cut through before sawing in order to clear a way for the saw.

The operation caused a considerable amount of bleeding, some blood squirting out from the wound when the horn was cut off. The respondent, immediately after the operation, applied a balsam to the wound. The sawing off of the horns occupied a few seconds in the case of each horn, and caused considerable pain. The sinuses of the head in each case were exposed, and atmospheric air was drawn into the sinuses, and expelled therefrom at each movement of respiration. Some of the animals commenced to eat immediately after the operation, but they had not been fed that morning ; others did not eat. After four or five days there was considerable inflammation, and consequent discharge of pus ; and, in the case of some of the animals, some were unable to eat, being in a state of fever, and evidently suffering considerable pain. With the exception of applying a little balsam, as above stated, no treatment followed the operation. The animals operated upon were afterwards more manageable than before, and ultimately they put on flesh, and throve well. It was further proved

that in England and Wales, in Berwickshire and Roxburghshire, total dishorning was not practised unless for surgical purposes, and that in East Lothian total dishorning was only carried out to a limited extent. The witnesses for the prosecution, who were in the habit of feeding cattle in courts, found that the objects which total dishorning was intended to attain were met either by separating the vicious and weak animals, or by cutting off a portion from the point of the horn, but so as not to open the sinuses. It was proved that the total dishorning of cattle was regularly practised by farmers and breeders of cattle in Fifeshire, Perthshire, Forfarshire, Kinrossshire, and Kincardineshire. The object for which the operation was performed was the safety of the animals feeding in cattle courts, which frequently suffered painful and serious injuries from goring and butting, the weaker animals being often prevented from feeding by the stronger, when the horns were allowed to remain. It was the opinion of the witnesses for the defence that it was impossible to feed cattle in open courts unless they were dishorned; and that, as the importation of Irish and Canadian cattle (the breeds mainly fed in the before-mentioned counties), which were more inclined to be troublesome than other breeds, had increased with recent years, dishorning was now more necessary than formerly. Partial dishorning, which some of the witnesses for the defence had tried, had been found unsatisfactory. It was further proved that the respondent had considerable experience in dishorning cattle, and that the operation on the cattle in question had been performed with skill and in the usual manner. The Court having remitted back to the Sheriff to state his findings on the comparative efficacy of partial and total dishorning, he further stated that he found it proved that, when cattle fed in courts are troublesome, total dishorning, which effectually prevents them from injuring each other, is for the benefit of the cattle, and that other ways of dealing with troublesome animals, viz. by fastening wooden balls to the tips of the horns, and partial dishorning, do not so effectually prevent them from injuring each other.

The question for the consideration of the Court was whether these facts inferred a contravention of the Act 13

& 14 Vict. c. 92; and, as we have said, their lordships were unanimously of opinion that there was no infringement of the statute.

It is greatly to be deplored that the existing statute has thus been held not to cover this undoubtedly cruel practice. With all deference to the learned judges who decided the case, we venture to submit that they went too far in the direction of reading in sheer wantonness as a requisite under the Act. In this case, as in that of *Renton v. Wilson*, they have followed the doctrine laid down by Mr. Justice Day and Mr. Justice Wills in the English case of *Lewis v. Fermo* (L. R. 18 Q. B. D. 532)—viz. that a person who, with reasonable care and skill, performs on an animal a painful operation which is customary, and is performed for the purpose of benefiting the owner by increasing the value of the animal, does not infringe the statute even though the operation is in fact unnecessary and useless. Because this operation is practised throughout large districts of Scotland, is customary there, and because it is practised with a purpose other than the mere infliction of pain, it is not struck at by the statute. So said the judges in both the Scottish cases. It is a dangerous interpretation of the Act. It is, moreover, inconsistent with an interpretation given to it in the past in cases of overdriving, and the like. A cabman who overdrives an already exhausted horse, in order to earn still one fare more, inflicts suffering on the animal for the "*bona fide* purpose of benefiting" himself financially, and not for the purpose of wantonly inflicting the suffering. Yet it has generally been held that such a case came under the Act. It is hard to distinguish between the two cases—the motives are the same. There is an absence of wantonness. There is the play of the same grasping, sordid desire for gain, and utter disregard of the excruciating pain endured by the animals. More legislation, therefore, is required; and we hope that it will not be delayed. We still, however, hold to the opinion of the English judges, that dishorning "causes extreme pain without an adequate and reasonable object, and is an unnecessary abuse of the animal, and therefore unjustifiable" under the existing statute.

Obituary.

THE HONOURABLE LORD MURE.—It is with the truest sorrow that we record the death, at Bournemouth on the 11th April, of this much respected and high-minded judge. Lord Mure, who was the youngest son of the late Colonel Mure of Caldwell, Renfrew, was born in 1810, and was therefore in his eighty-first year. He was educated at Westminster School, and at the University of Edinburgh. He was admitted to the Faculty of Advocates in 1831, and was appointed one of the Counsel for the Crown in 1843, which office he held for three years. From 1853 to 1858 he was Sheriff of Perthshire. Lord Mure then had a brief career as Solicitor-General for Scotland, and a still more brief career (from April to June 1859) as Lord Advocate. From May 1859 until January 1865 he sat in Parliament in the Conservative interest as member for Bute. Lord Mure was raised to the Bench in 1865 as a Lord of Session, and in 1870 was also created a Lord Commissioner of Justiciary. He resigned his office in 1889, and he has since then lived in retirement at Bournemouth. Lord Mure will be remembered as a lawyer of sound judgment and sturdy common sense; as a most conscientious and painstaking judge; and as an honourable gentleman, invariably courteous and patient towards all who came in contact with him.

MR. ALEXANDER DICK.—Mr. Alexander Dick, Writer, died at Helensburgh on 11th March, at the great age of ninety-four. It is already a quarter of a century since he retired from the active pursuit of his profession, which he carried on in Glasgow. Mr. Dick was a son of the Rev. Dr. Dick, Professor of Theology, and minister of Greyfriars U.P. Church, Glasgow. He was educated at Glasgow University, and he entered the Faculty of Procurators in 1822. He was a member of the firm of Dick, Stevenson, & Muir, Solicitors.

MR. JAMES AYTOUN, Writer, died in Edinburgh on 13th April, in his seventy-second year.

MR. JOHN MARSHALL HILL, Writer, Glasgow, and senior member of a well-known firm of solicitors there, died at Rutherglen on 20th April. Mr. Hill had been in practice for over fifty years.

The Month.

Sheriff-Principal Crichton.—Sheriff-Principal Crichton of the Lothians and Peebles, who has been suffering from indisposition, has obtained six months' leave of absence, and Professor Rankine, of Edinburgh University, has been appointed interim Sheriff.

* * *

Mr. Justice Stephen's Successor.—It is officially announced that Her Majesty has been pleased to approve of the appointment of Mr. Richard Henn Collins, Q.C., to be one of the Justices of the High Court, in the place of Mr. Justice Stephen, resigned.

* * *

Strike at the Parliamentary Bar.—The following verses appeared in the *Pall Mall Gazette*:—

“ Ere I go into Court I will read my brief through,
 Says I to myself says I,
 And I'll never take work I'm unable to do,
 Says I to myself says I.
 My learned profession I'll never disgrace,
 By accepting a bribe with a grin on my face,
 When I haven't been there to attend to the case,
 Says I to myself says I.

In other professions in which men engage,
 Says I to myself says I,
 The Army, the Navy, the Church, or the Stage,
 Says I to myself says I,
 ‘Professional licence if carried too far
 Your chance of preferment will certainly mar,
 And I think that the same should apply to the Bar,’
 Says I to myself says I.”

Sunday Contract.—An Indianapolis church member who subscribed to a church building fund attempted to wriggle out of it by claiming that the contract was illegal, as it was made on Sunday; but the Court has decided that he must pay.

* * *

Women Jurors.—Senator Newell has introduced a Bill, providing that when a coroner impanels a jury to hold an inquest over the body of a female, that jury shall be composed of women. This Bill ought to pass. We have no doubt Senator Newell will follow it till he sees it enacted into a law. This is one step in the right direction. Who of the senators will take another step?—*Chicago Legal News.*

* * *

Legal Patronage.—So much legal patronage has never fallen to any Government as that which Lord Halsbury has been called upon to dispense. Within a few weeks he has had to fill up two High Court judgeships, a County Court judgeship, a Mastership in Lunacy, and a Registrarship in Bankruptcy. He may possibly soon have the appointment of an additional Chancery judge. On the whole, no fault can be found with the appointments made. Unknown men frequently make excellent inferior judicial officers, and kinship to high officials is in itself no disqualification.

* * *

Form of Question.—Attorney: "Now, mark me well, sir. Do I understand you to say that you were standing within ten feet of the parties when the fight began?" Witness (to the Court): "Your Honour, have I got to answer that question?" The Court: "I see nothing wrong in the question. You may answer it." Witness (to Attorney): "Well, sir, I don't know whether you understand me to say it or not."

* * *

Disturbing Religious Worship.—An apparently novel case of disturbance of religion is recently chronicled in the newspapers. A discharged chorister took his revenge by sitting

in the congregation and singing purposely out of tune. The parish want to know if there is no redress. Certainly; indict him for disturbing religious worship, and prove that he could sing in tune if he wished. The case is distinguishable from the famous North Carolina case of *State v. Linkhaw*, where the defendant sang as well as he could, which was but badly. —*Albany Law Journal*.



Legislation Mortis Causa.—The lower branch of the Ohio Legislature has passed a law which gives an undertaker the right, if a coffin is not paid for within three years, to dig it up, eject the tenant, and relaim the property—a sort of mechanic's lien on the houses of the dead. Also the stone-cutter may remove the monument which records the virtues of the dead—wipe out, as it were, the mortuary honours, and in its place chisel other records. There is, in the passage of such a Bill, an unconscious measure of the character and ability of those who vote for its passage.—*Legal Advertiser*.



Poor Law Reform.—Until the year 1886 it was not until a wife became actually chargeable on the parish that a husband could be compelled to support his destitute wife: he could be punished for refusing or neglecting to furnish that support, as a rogue and vagabond under the Act Geo. IV. c. 83, secs. 3 and 4. But five years ago a change was made in the procedure, by which a husband may be compelled to support his wife, by the Act 49 & 50 Vict. c. 52. This Act has worked well, and has been the means of saving much of the expense that was formerly incurred by Guardians in the relief of married women whose husbands were able to support them. This experience has encouraged four legal members of Parliament—Mr. Gainsford Bruce, Mr. Gully, Mr. Dugdale, and Mr. Lockwood, all Queen's Counsel—to endeavour to make the same procedure apply in the case of parent and child. Their Bill proposes to amend the procedure by which a child may be compelled to contribute to the relief of his destitute parent. By the Poor Law Act 43 Eliz. c. 2, sec. 6) the children of every poor, old, blind,

lame, and impotent person, or other poor person not able to work, being of sufficient ability, are made liable, at their own charges, to relieve such poor person. But, of course, according to the existing law, this liability can only be enforced when or so long as the parent is actually chargeable to the parish. If the proposed change in the law is made, it will be lawful for the destitute parent to summon his child or children before the magistrates in Petty Sessions, or before any stipendiary magistrate, and thereupon the magistrates, if satisfied that the child or children, being able wholly or in part to maintain the parent, has or have wilfully refused or neglected to do so, will be able to order such weekly payment from the child or children not exceeding £1 a-week, as the magistrates may consider to be in accordance with the means of the child or children, and with any means the parent may have for his support; the payment will be enforceable just as the payment of money is enforced under an order of affiliation. The order for payment will be variable upon proof that the means of parent or children have changed since the original order. The proposal is such a good one that we would like to see it extended to meet the converse case of a parent's responsibility for the maintenance of his child. Each of the two responsibilities might well be enforced in the same way.—*Law Times*.



The Scottish Private Bill Legislation Bill.—The above measure passed its second reading stage in somewhat extraordinary circumstances. It is a measure revolutionary in character, and yet introduced by the present Constitutional Government. A direct step towards Home Rule for Scotland, it has nevertheless failed to obtain the support of the present Scottish Radical members. So far as Scotch votes were concerned, the second reading would have been defeated by a majority of seven. Thus we have the curious spectacle of the Unionist members for Scotland supporting a Home Rule proposal and the Separatists voting against it. The Government have referred the Bill to a Committee, and have expressed their willingness to amend it. It remains to be seen in what shape it will emerge for further consideration by the

House at large. But the prediction may be hazarded that the Bill will not pass in its present shape this session, or in fact in any session.

The truth of the matter is, that the Bill in question is a radically bad one. It is a curious problem to discover how the Government were ever induced to take it up at all. The Bill introduces a revolution, and is even in some respects unconstitutional. What public opinion is at its back it is hard to say. The various public and local bodies have indeed declared unanimously in its favour. But it is said by those who know that the private opinions of the individuals composing those bodies are strangely at variance with their public utterances. Whilst professing to support the Bill warmly as only justice to Scotland, many of them declare in private that the present state of things is much to be preferred to the new proposal. And it would be unfair to attribute their opinion entirely to the occasional jaunts to London (at the ratepayers' expense) which some of them enjoy from time to time. To business men these trips have very little pleasure in them after the novelty has worn off. Nor are the great railway companies in favour of the proposed change. They all prefer the decisions of the High Court of Parliament, however expensive it may be to obtain them. The Scottish Home Rulers regard the Bill as simply a specious attempt to harm their cause. Instead of hastening on their movement, it will, they say, retard it. What remains in its favour is only the stubborn and unreasoning pseudo-patriotism which is the curse of Scottish politics. According to this it must necessarily be better to try the case of Private Bills in Scotland and before a Scottish tribunal. It is the old policy of "keep your ain sea-guts for your ain sea-maws." The one body which is directly interested in the new scheme, and will directly gain by it, is the Scottish Bar. Work languishes with the brethren of the long robe north of the Tweed. Their case should count for something, but not, we submit, for everything.

As to the Bill itself, endless difficulties will occur in working it. Its main provision is, that all Private Bills relating to Scotland, which have passed their second reading, and are opposed, are to be referred to the Commission created

by the Bill, instead of to a Select Committee as heretofore. At this point the first difficulty will arise. The Chairman of Committees is to have the right of excluding from the Commission all such Bills as he shall hold do not exclusively relate to Scotland. These are to be referred to Select Committees as at present. Now it is extremely difficult to draw the distinction in question. For example, as regards almost all the Scotch Railway Bills, every one of them must affect the English connecting lines, and consequently would not be held to come under the provisions of the Bill at all. How will this square with the intentions of the promoters, whose desire is to have these matters tried entirely in Scotland? Then again the composition of the proposed Commission is open to very grave objections. It is to consist of three *ex officio* Commissioners, and one to be specially appointed. The former are the judge who happens for the time to be the Commissioner appointed for Scotland to sit upon the Railway Commission under the Railway and Canal Traffic Act of 1888, one of the said Commissioners appointed by themselves, and a member of Parliament chosen by the Committee of Selection. The appointed Commissioner is to be one of a panel of five, nominated by the judges of the Court of Session, and selected by the Lord President of that Court. He is to hold office for one year only, but may be re-appointed, is to be removable by the Lord President for inability or misbehaviour, and is to receive such remuneration as the Secretary for Scotland and the Treasury may jointly approve. It is obvious that the difficulty of obtaining a good man to serve under such conditions will be considerable. It is noteworthy, also, that the sections appointing the Commission calmly ignore the House of Lords. They make no provision for its representation upon the Commission, although it is a co-ordinate branch of the Legislature, and its members are well known to perform the most useful work upon the present Select Committees.

It is further provided that the new Commission is to sit at Edinburgh, Glasgow, Dundee, Aberdeen, or Inverness at its convenience. Perth has put in a claim as another centre, which it may be difficult to resist. The Commission is to have all the powers of a Select Committee, and may decide all questions as to *locus standi*, costs, and the like. After con-

cluding its investigation it is to report to the House, and its report is to be equivalent to that of a Select Committee. Such reports will then be dealt with according to the practice of Parliament, except that they may be referred back for further inquiry, or report generally or specially, but not to a Special Committee. Either House may then deal with the Bill either by amendment or otherwise. The Commissioners may regulate their proceedings by a general order, subject always to the sanction of Parliament. They are to have an office in Edinburgh with a sufficient staff, and existing parliamentary agents may practise before them.

It is sufficient here to summarise shortly the objections to this measure. It will, in the first place, substitute a bad tribunal for one which at present gives decisions which are satisfactory to all concerned. The questions which at present come before Select Committees are not questions of pure law, but of mixed law and policy. The present decisions are unbiassed and fair; in Scotland they must be tinged with local prejudices. It is claimed for the new system that it would lessen expense, but the probabilities are all the other way. Heavy as the present expenses are, experience goes to show that local inquiries cost even more. For one thing, when there is a question of bringing witnesses up to London, more discrimination is exercised than if they were to be heard in the localities where they live. But the fatal objection to the scheme is, that it derogates from the power of Parliament, by taking from it business which is essentially legislative in character. We have seen that the House of Lords is ignored in the matter. Even as regards the Lower House it is obvious that, to a great extent, its power over Private Bills would be lost under the new arrangement. And if not lost, it may be asked, what advantage would be gained by the Bill? The saving of time and trouble to overworked legislators, which is claimed for the new arrangement, would prove to be a myth. Again, it may be asked if the new system is to be confined to Scotland, or extended to England and Ireland? If so, it should be dealt with by a general measure. But the present Bill is a bad one, and based upon a bastard Home Rule; and we can only wonder that it should have obtained the support of Her Majesty's Government.—*London Law Times*.

Curious Circuit Customs.—Old customs, rapidly dying out under modern innovation, appear to retain greater vitality among ancient institutions. As “going circuit” by the judges of England is one of the most ancient occurrences in our history, one is prepared to find some of the oldest ceremonies and observances connected with that time-honoured usage still existing. From an article in *The Leisure Hour*, we extract some interesting facts concerning “Circuit Customs.”

Let us first take the matter of gloves. Every one knows that when an assize town has no prisoner for trial to bring before the Queen’s Justices, or where, in more ancient time, no prisoner had to be sentenced to death, the town is, or was, said to have a “maiden assize;” and the High Sheriff presented, and still presents, the judge presiding in the Criminal Court with a pair of white kid gloves.

But the *meaning* of the custom is not so clearly understood, and has occasioned much discussion. To wear gloves, or have the hands covered, is a mark of superiority, whereas to go without gloves is a mark of submission; and as a judge owes submission to the Sovereign whom he represents, and under whose commission he sits, it would be an assumption of too great dignity were he to have his hands covered when acting as deputy of the Sovereign in the execution of the Royal Commission; hence, says Seldon, “judges wear not gloves while they act in their commission.” But where there are no prisoners to try, or in ancient times where no prisoner was to be condemned to death, and therefore (death being the common punishment of all criminal offences, from stealing to the value of one shilling upwards) the higher powers of the Crown were not to be called in exercise, and ordinary magistrates’ functions were to be executed by “delivering the gaol,” the Sheriff signified to the judge, by presenting him with gloves, that he might retain that portion of his attire of which he had divested himself while acting as his Sovereign’s representative. The gloves so presented are usually *white*, as indicative of the purity of the county from crime.

Newcastle-on-Tyne is the only remaining circuit town in England which presents gloves at the assizes, and which still observes some of the olden ceremonies in connection with

judges of assize. With the single exception of the city of Bristol, no other town insists upon entertaining the representatives of the Crown during the assizes. When the assize work is over, the mayor and aldermen, in full regalia, attend the judges, and the mayor, as spokesman, makes a speech somewhat as follows :—

“My Lords, we have to congratulate you upon having completed your labours in this ancient town, and have also to inform you that you travel hence to Carlisle through a border country much and often infested by the Scots; we therefore present each of your lordships with a piece of money to buy therewith a dagger to defend yourselves.”

He then presents to the senior judge a piece of gold coin of the reign of James I., called a *Jacobus*, and to the junior judge a similar coin of the reign of Charles I., a *Carolus*, and, after having been duly thanked by the judge in commission, retires. The Corporation have had at times great difficulty in procuring these coins for the purpose of the assize; but as keeping up the ceremony is enjoined by one of their ancient charters, they are loath to let it drop.

We cannot but share the doubts expressed by a witty ex-judge, who, upon receiving the gold after the mayor's exordium, said: “I thank the mayor and Corporation much for this gift. I doubt, however, whether the Scots have been so troublesome on the borders lately; I doubt, too, whether daggers in any number are to be purchased in this ancient town for the protection of my suite and myself; and I doubt if these coins are altogether a legal tender at the present time.”

The steward of Warwick Castle still brings to the “judge's lodgings,” spring, summer, and winter,—if a winter assize be there held,—the keys of Warwick Castle grounds, that the judges may “recreate themselves therein” during their stay in the town.

Presents of food and drink, especially of the former, are now rarely made to the justices of assize, though anciently they were very frequent. Flowers and fruit are still tendered by and accepted from country gentlemen of position; and venison, when in season, from the great country parks and seats, the owners of several of which have affixed to the con-

ditions of the tenure of their estates that of providing the King's justices with "fat bucks and does at the assizes."

At Cambridge, where the judges are lodged in Trinity College, the "heads of houses" present twelve bottles of very choice port wine, and brew three barrels of very potent ale for the judges and their attendants; while at Lancaster, under the provisions of the will of a benevolent old lady, who died some centuries since, and who doubtless gained some heavy verdict in her favour, two dozen bottles of very rare and fine old port are brought to the "lodgings" at the commencement of each assize.

The only other present we need allude to is the bouquet of flowers placed on the bench before the judge during the exercise of the duties of his office. These are mostly the result of ancient bequests; but where there is no special means from which they may be supplied, the High Sheriff provides them, sometimes at great personal cost.

Flowers in Court were originally used for preventing by their odour the effects of "gaol fever" upon the judge and his associates on the bench; and for a similar purpose, and until quite recently, small bunches of rue were placed before the prisoners upon trial at the Old Bailey.

Such are some of the old circuit customs which still exist, but a greater number are among the "things which were." Not more than forty years ago in every garrisoned town the soldiers could not leave their quarters without leave of the judge first had been obtained, and to procure which, the officer first in command, in "full fig," with adjutant attending, waited at the judge's lodgings on the commission day for the requisite permission to loose his men from barracks. He presented to the judge for approval or alteration the table of rations accorded to the troops, and handed in the surgeon's report as to the health of the soldiers.

The governor of Lancaster Castle and the mayor of Lancaster, until recently, severally gave up their keys and staff of office to the assize judge when he visited that town; while both at Appleby and at Chester the judges resided during the assizes in the castles themselves, and every night, after "locking up," the keys were brought to them as governors of the fortresses. Durham is now the only town in England which

receives the judges into a castle, and a grand one too, with the accessions of ancient carved oak, tapestry, and most ghost-like state rooms.

The mayor of Banbury, accompanied by several members of the Corporation, until lately presented themselves at the judges' lodgings at Oxford, and offered the judges Banbury cakes, wine, six long clay pipes, and a pound of tobacco, accompanying the gift with many complimentary expressions.

Until 1859 the ancient Corporation of Ludlow were accustomed to come to the door of the judges' carriage, as they travelled by rail from Shrewsbury to Hereford, and to offer the cake and wine, the former upon an ancient silver salver, the latter in a "loving cup" wreathed with flowers.—*Green Bag*.



AN Iowa Justice of the Peace didn't actually fine a man eleven dollars for declaring that the world was flat, but because he knocked the postmaster down for insisting that it was round. It was a narrow escape, though, and the defender was cautioned to look out next time.—*New Jersey Law Journal*.



Fees of the Parliamentary Bar.—We published on Thursday a formidable list of the counsel engaged on the Watkin Bill. It comprised eight Queen's Counsel and thirteen "juniors." But all but one Q.C. (except those appearing for the promoters) and several of the juniors are "stage-army-men," and do duty several times over for several clients. Thus one Q.C. appears for eight, another for four, two for three, one for two parties, who may or may not have different or even conflicting interests, and as to some of whom, such as the Clergy Orphan Corporation and the vestry of St. John's, Hampstead, one wonders why they appear at all, except it be that their legal advisers love the law—not wholly for its own sake. One also wonders why others are even allowed to appear, why the Great Northern, the Midland, and the North-Western should spend their shareholders' money and waste the public time and expense merely to bolster up their own monopolies. But so it is, twenty different sets of people are allowed to

rush in and lavish their money on Parliamentary counsel, Parliamentary agents, and Parliamentary engineers, to show that people who wish to spend their money in giving the public greater railway facilities should not be allowed to give them. It is interesting to estimate the cost of this little band of Parliamentary counsel only. Without seeing the briefs, it is of course impossible to know exactly, but we can form a shrewd estimate of what is probably a minimum cost. In the first place, these forty-three different counsel (though only twenty-one different men) cost 215 guineas to retain. The promoters' three counsel cost, presumably, at least 450 guineas on their briefs; the most reduplicated Q.C.'s can hardly cost less than 375 guineas apiece on their briefs, the others, more eminent though less reduplicated, not less than 600 guineas between the four of them; and the thirteen juniors, some appearing without a leader, some with, will, on a very modest estimate, be briefed to the tune of 700 guineas between them. Each of these twenty-one-forty-three gentlemen will also receive 15 guineas a day, by way of daily reminder of their duties, while the case lasts. Say it lasts only ten days—and as the day is from twelve to four, with intervals for refreshment and "divisions," that is a moderate expectation—and we have another little sum of 6450 guineas to be distributed. So altogether the little bill of the Parliamentary counsel totals up as follows:—

Retainers,	215 guineas
Briefs (Q.C.'s),	1700 "
" (Juniors),	700 "
Committee and Consultation Fees for ten days,	6450 "
<hr/>	
9065 guineas, or over £9500	

And this is besides the payment of twenty-one-forty-three clerks, as it is one of the privileges of Parliamentary counsel, in common with their less highly remunerated brethren of the Bar, that the client pays their clerks. If, therefore, this little bill does not cost £10,000, divided among twenty-one gentlemen, who at the same time are most of them probably briefed several times over, to be in several different places at once on the same day, we shall be surprised.—*Pall Mall Gazette*.

Mr. Justice Collins.—The Queen has approved of the appointment of Mr. Richard Henn Collins, Q.C., of the Northern Circuit, as a judge of the English Queen's Bench Division, in succession to Mr. Justice Stephen, retired. Mr. Collins, who is the third son of Mr. Stephen Collins, Q.C., of Dublin, was born in 1842, and was for some years at Trinity College, Dublin, where he took the highest honours in Classics and Moral Science. He left Dublin, before taking his degree, for Downing College, Cambridge, where he was bracketed fourth in Classical Tripos. He was elected a Fellow of Downing in 1865, and was made an honorary Fellow of that College on the expiration of his Fellowship. He was called to the Bar at the Middle Temple in November 1867, was created a Queen's Counsel in 1883, and was elected a Bencher of his Inn in the following year. Both as a junior and a Queen's Counsel, Mr. Collins has been in the enjoyment of a large and lucrative practice for a long time past. A few years ago, in consequence of the large increase of his London business, the learned gentleman ceased to attend circuit, except with the inducement of a special fee. The last two noteworthy cases in which Mr. Collins appeared lately were the important licensing appeal of *Sharpe v. Wakefield*, in the House of Lords, and what is popularly known as the "Clitheroe abduction case," in which he was leading counsel for Mr. Jackson in the Court of Appeal. Mr. Collins is well-known as a sound and painstaking lawyer, and his elevation to the Bench will be a thoroughly popular one with both branches of the legal profession. He has been a member of the Bar Committee for some years past, and is joint author of *Smith's Leading Cases*.



It is nothing new to find anomalies in the incidence of taxation. This was sorrowfully confessed by Baron Pollock the other day in *Bowers v. Harding* (64 L. T. Rep. N. S. 201), an income-tax case of peculiar hardship. Husband and wife were master and mistress of a National School at a joint salary of £150. In order to attend to her school duties, the wife was obliged to engage a servant to do the work of the household. The servant cost in board and wages £30, but the

husband and wife were not allowed to deduct this or any amount from their income for purposes of taxation. Baron Pollock and Mr. Justice Charles decided that the whole £150 was to be charged in the name of the husband, under Schedule E of Sir Robert Peel's Act, as being derived from a public office or employment. It was impossible to say how much was attributable to the husband and how much to the wife. It was a salary liable under Schedule E, as being derived from a public appointment; public, because it was paid for out of the taxes of the country, and was recognised as a part of the public service. When it is admitted on the Bench that a case raises a state of things which one may regret, surely it is time for the Legislature to intervene. There is no branch of the law which requires remodelling and codification more than the Income Tax Acts, if, as seems probable, the income tax is to remain a permanent thing.—*Law Times*.

* * *

Suicide.—This is a subject that is frequently referred to in relation to various branches of the law. We have seen it lately the occasion of an interesting judgment upon a point of ecclesiastical law, viz. as to the recent sentence and service of reconciliation in St. Paul's Cathedral. There was another case of painful interest that lately gave rise to a discussion on the subject of concealment of the finding of a coroner's inquest. Frequently questions arise in relation to the subject of suicide as connected with policies of life insurance. As a criminal offence in itself, suicide is, by the law of England, simply regarded as self-murder; and, in order to constitute the crime, all those same conditions must concur which, in the case of killing another person, would make the act a murder, with the exception that the offender is his own victim. So completely does the law regard it in the same light as murder, that every other person who aids or abets a suicide is guilty of murder.

It is the first requisite, therefore, in the definition of the crime of self-murder, that the slayer of himself should be of sound mind and have attained to years of discretion (1 Hale, P. C. 411; 3 Inst. 54). A man or woman is, as to capital offences, of the age of discretion at fourteen years old. In the

Journal of the Statistical Society for March 1886, Dr. Ogle gives, amongst other information, a table showing the average annual suicides in England and Wales at successive ages per million lives between the years 1858 and 1883. This table shows that, taking both sexes together, the rate of suicide rises steadily and rapidly after the tenth year has been passed, and although no figures are given for any period previous to the tenth year, Dr. Ogle mentions that there were actually four cases of suicide of children between the ages of five and ten years during the twenty-six years observed. It is no crime, however, by the law of England, for any human being to take his or her own life before he or she has attained to the age of fourteen years. It seems, therefore, that no person could be convicted of aiding or abetting a child under the age of fourteen years to take its own life. This is a point that might attract the attention of those benevolent persons who have done so much of late in the interests of children to protect them from cruelty. It might give rise to a very interesting point of law in connection with the subject of life insurance.

As we have already stated, not only is it requisite that the party, in order to be guilty of the crime, should have arrived at years of discretion, but must be of sound mind. In adverting to this, Serjeant Hawkins makes some observations (1 Hawk. P. C. c. 27, sec. 2, 3) which we cannot refrain from quoting. "I cannot," says he, "but take notice of a strange notion which has unaccountably prevailed of late, that every one who kills himself must be *non compos* of course; for it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason. If this argument be good, self-murder can be no crime, for a madman can be guilty of none; but it is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not, with as much reason, be argued that the murder of a child or a parent is against nature and reason, and consequently that no man in his senses can commit it? But has a man, therefore, no use

of his reason because he acts against right reason? Why may not the passions of grief and discontent tempt a man knowingly to act against the principles of nature and reason in this case, as those of love, hatred, and revenge, and such like, are too well known to do in others?" And yet this passage occurs in a work which was first published in 1716. Even Lord Hale, some half a century previously, seems to have observed the first indications of opinion setting in the direction of the same fallacy, for he says (1 Hale, P. C. 412): "It is not ever melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence but are under such infirmities; but it must be such an alienation of mind that renders them to be madmen, or frantic, or destitute of the use of reason. A lunatic killing himself in the fit of lunacy is not *felo de se*; otherwise it is, if it be at another time." Lord Coke (3 Inst. 54) puts it in this way: "If a man lose his memory by the rage of sickness or infirmity, or otherwise, and kill himself while he is not *compos mentis*, he is not *felo de se*; for, as he cannot commit murder upon another, so in that case he cannot commit murder upon himself. If one, during the time that he is not *compos mentis*, give himself a mortal wound whereof he, when he hath recovered his memory, dieth, he is not *felo de se*; because the stroke which was the cause of his death was given when he was not *compos mentis*; *et actus non facit reum, nisi mens sit rea*." Lord Coke then adverts to the point that death of the self-inflicted wound must occur within a year and a day, and says: "If a man give himself a wound, intending to be *felo de se*, and dieth not within the year and a day after the wound, he is not *felo de se*." The limit of the year and a day belongs likewise to the law of murder.

"Malice aforethought" is as essential to the crime of self-murder as to that of any other murder. The best summary of those states of mind preceding or co-existing with the act which are summed up in this technical phrase is that given by Mr. Justice Stephen in his Digest of the Criminal Law in the definition of murder. The first of these he says is "an intention to cause the death of, or grievous bodily harm to, any person whatever, whether such person is the person actually killed or not." Bacon affords an illustration of this

in his Law Tracts, p. 81, where he notes that "if a caliver (*i.e.* hand-gun) be discharged with murderous intent at J. S., and the piece break, and strike into the eye of him that dischargeth it, and killeth him, he is *felo de se*." So also Lord Hale (1 Hale, P. C. 413); "If A. strike at B. with a knife intending to kill him, and missing B., had stricken himself, and killed himself, there A. is *felo de se*, because that act whereby he intended to murder B. shall have the same construction if it kills himself or any other person, as it should have done if it had taken its effect upon B." Lord Coke puts another case (3 Inst. 54) which is repeated by Mr. Dalton and by Serjeant Hawkins, which is as follows: "If A. gives B. such a stroke as felleth him to the ground, and B. draweth his knife and holds it up for his own defence, and A. in haste, meaning to fall upon B. to kill him, falleth upon the knife of B. whereby he is wounded to death, he is *felo de se*." But Lord Hale says (1 Hale, P. C. 413) that A. is not *felo de se* in this case, but it is only *per infortunium*. We need not repeat the other states of mind comprehended in the phrase "malice aforethought," as we have already indicated where they may be found most conveniently stated in a modern text-book. To complete the matter, the following instance may be cited from Lord Hale as showing the necessity of the element of malice in the technical sense in order to constitute the crime, viz.: "If A., with an intent to prevent a gangrene beginning in his hand, doth without any advice cut off his hand, by which he dies, he is not thereby *felo de se*, for though it was a voluntary act, yet it was not with an intent to kill himself." It seems hardly necessary to add a caution to the reader, that this instance must not be understood to justify a man, in terror of a mortal and painful disease, taking his own life to avoid the lingering torments of an incurable malady.

Of course, in every case of self-murder the act immediately conducing to the end must proceed from the party himself. "He who kills another upon his own desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head: but the person killed is not looked upon as *felo de se*, inasmuch as his assent was merely void as being against the laws of God and man" (1 Hawk.

P. C. c. 27, sec. 6). For instance, Saul, after his armour-bearer had refused, on his request, to slay him at the battle of Mount Gilboa, took a sword and fell upon it, thereby being *felo de se*. But when David, on hearing from the Amalekite the lying tale that he (the Amalekite) had, at Saul's own request, stood upon him and slain him, David rightly called one of the young men, and said, "Go near and fall upon him," thus treating him as a murderer, for he knew not that the story was false, but for Saul he lamented.

No doubt it was the consequences of the crime of self-murder that induced the prevalence of the tendency of jurors to bring in verdicts of *non compos mentis*. The complete offence in the present day is its own punishment, but that is by statute. At common law, on a verdict of *felo de se* all the goods and chattels of the party so offending were forfeited (3 Inst. 54). But there was no forfeiture of lands, nor of the wife's dower (*ibid.* and 1 Hale P. C. 413). Goods and chattels, of course, included chattel interests in land, and hence arose the great case of *Hales v. Petit*, 1 Plowd. 253. It is put in a nutshell by Lord Coke thus: "A lease is made for years to the husband and wife, the husband drowneth himself, the lease is forfeited, as you may read at large in Plowden's Commentaries" (3 Inst. 55). And those who take an interest in curiosities of the law cannot do better than take Lord Coke's advice, and read the case at large in Plowden. The judgment of Sir Anthony Browne, one of the justices of the Common Pleas who heard and determined that case, is frequently supposed to have suggested to Shakespeare the celebrated argument of the clowns in Hamlet concerning suicide. Upon the knotty point, viz. to what time the forfeiture should have relation, the judges said it should be to the time of the original offence committed, which was the cause of the death, and that was the throwing himself into the water, which was done in his lifetime; for, as Browne said, "Sir James Hales was dead, and how came he to his death? It may be answered—by drowning; and who drowned him? Sir James Hales; and when did he drown him? In his lifetime. So that Sir James Hales, being alive, caused Sir James Hales to die; and the act of the living man was the death of the dead man. And then for this offence it is reasonable to

punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive when the punishment came after his death? Sir, this can be done no other way than by divesting out of him from the time of the act done in his life, which was the cause of his death, the title and property of those things which he had in his lifetime." However, all such interesting discussions were swept away as questions of legal interest by the Act for the abolition of forfeitures for felony, 33 & 34 Vict. c. 23.

A custom formerly prevailed of burying persons against whom a coroner's jury had found a verdict of *felo de se* at four cross-roads, with a stake driven through the body. There seems to have been no legal authority for it. Cross-roads certainly had an unhallowed reputation, probably descending from pagan times, as being the places where the Romans used to place the statues of Hecate, one of the goddesses of the under world. It is related also that, when suicide had become so frequent among the Roman ladies as to threaten ill effects to the commonwealth, the Senate decreed that the bodies of all who died by their own hands should be exposed naked in the public ways. And by the rubric in the Common Prayer before the burial office (confirmed by statutes 13 and 14 Car. II. c. 4), persons who had laid violent hands upon themselves were not to have that office used at their interment. In 1823 it was enacted by the 4 Geo. IV. c. 25, that thenceforth it should not be lawful for any coroner to issue his warrant for the interment of a *felo de se* in any public highway; and he was to order the body to be privately buried in a churchyard or other burial ground, without any stake being driven through the body, between nine and twelve at night, and without any religious rites. This has been further altered by 45 & 46 Vict. c. 19, which now provides that the body of a suicide may be buried in any way authorised by 43 & 44 Vict. c. 41, i.e. either silently or with such Christian and orderly religious service at the grave as the person having charge of the body thinks fit.—*Justice of the Peace.*

Reviews.

A Handbook of Court of Session Practice. By DAVID BALFOUR, Solicitor. Edinburgh: Green & Son. 1891.

THIS book is primarily intended for students. The monumental treatise of the learned Sheriff of Fife and Kinross is far too extensive and detailed to suit the purpose of those who are merely reading for law examinations; but we should have thought that the well-known work of Mr. Coldstream—already in a fourth edition—would have supplied all that can be desired in this way. Mr. Balfour's Handbook, however, is more condensed even than Mr. Coldstream's, and extends to less than half its length. It is excellently arranged; and the statement of the rules and practice of procedure, though necessarily and purposely general, is admirably clear and succinct. Nothing superfluous has been introduced to cumber the work and to obscure the connected exposition of the course of procedure; and, on the other hand, we cannot complain of any serious omission. It will undoubtedly be welcomed by students. Its author claims for it, in his Preface, that practitioners will find in it a handy book of reference on the law of procedure. To deny this altogether would be misleading; and in expressing the opinion that this claim must be admitted with qualification, we certainly find no fault with the manner in which Mr. Balfour has executed his work. Rather do we commend it; because we only repeat our opinion that a student's handbook is not the best form of work for a practitioner. While this work will undoubtedly be convenient to turn to in a hurry, practitioners will still continue to have recourse to the more exhaustive works on the subject.

Kant's Principles of Politics, including his Essay on Perpetual Peace. A Contribution to Political Science. Edited and Translated by W. HASTIE, B.D., Translator of Kant's *Philosophy of Law*, Levy's *Philosophy of Right*, etc. Edinburgh: T. & T. Clark. 1891.

STUDENTS of Law and Politics in this country are under obligation to Mr. Hastie. It is no slight advantage to be

enabled to make acquaintance with, or to study more carefully, the masterpieces of foreign thinkers through the medium of so appreciative a translator. Mr. Hastie's introduction to the present work ought to be read by every one who is interested in this department of thought. The translation strikes us as true and lucid.

Qualification of Voters: and Revised Edition of Mr. A. Graham Murray's Digest of Registration Cases. By ROBERT L. BLACKBURN, Advocate. Edinburgh: Green & Sons. 1891.

MR. BLACKBURN is well advised in prefixing to his revised edition of Mr. Murray's Digest a *précis* of the law of the qualification of voters. This is clearly set out in two short chapters. The digest of cases is brought down to date; and a useful feature of the work is that the editor has retained those cases which have been overruled by later decisions or superseded by statute, thus affording in his work a complete compendium of all the decisions. Mr. Blackburn's volume ought to be in the hands of every registration agent throughout the country, and also of all those who take an active interest in the politics of their districts. The form is convenient, and the work has been carefully and successfully done.

English Decisions.

MARCH—APRIL.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

COLLISION.—*Laches—Interest—Measure of damages.*—A collision having occurred between the British ship *M.* and the Norwegian steamship *K. M.* in 1878, the owners of the *M.* in 1889 instituted the present collision action *in rem*. The *K. M.* was owned by a limited company in which there had been charges of interest since the collision. During the eleven years between the collision and the institution of the suit, the plaintiffs had several opportunities of arresting the *K. M.* within the jurisdiction. The registrar in assessing the plaintiffs' damages, allowed them interest on the

amount recovered from the date of the collision. The defendants appealed. *Held* (by the President), that notwithstanding the delay in the institution of the suit, the registrar had acted in conformity with the practice of the Admiralty Court, and that the interest must be allowed. — *The Kong Magnus*, High Ct., Adm. Div., 10 March.

HABEAS CORPUS.—*Husband and wife*—*Right of husband to forcible control of wife.*—*Held* (by the Lord Chancellor, the Master of the Rolls, and Lord Justice Fry), that a husband has no right to take forcible possession of his wife, and confine her for the purpose merely of compelling her to render to him conjugal rights.—*Reg. v. Jackson*, Court of Appeal, 19 March.

INN.—*Licence—Renewal—Discretion of justices—Licensing Act 1828* (9 Geo. IV., c. 61), *sec. 1*—*Licensing Act 1872* (35 & 36 Vict. c. 94), *sec. 42*—*Licensing Act 1874* (37 & 38 Vict. c. 49), *sec. 26.*—The discretion of the licensing justices as to granting or refusing a licence by way of renewal under the Licensing Act 1828 (9 Geo. IV. c. 61) in respect of excisable liquors to be drunk on the premises is absolute, provided it be exercised judicially, and is not affected by the Licensing Acts 1872 and 1874. Justices refused to renew a licence on the grounds of the remoteness of the inn from police supervision, and of the character and necessities of the neighbourhood. *Held*, that it was competent to them to refuse the renewal on such grounds.—*Sharpe v. Wakefield*, House of Lords, 20 March.

COPYRIGHT.—“*Book*”—“*Letterpress*”—“*Painting or drawing*”—*Infringement*—5 & 6 Vict. c. 45—25 & 26 Vict. c. 68.—A motion was made by the plaintiffs for an interim injunction to restrain the defendants from printing and publishing or distributing any copies or colourable imitations of a “picture of publication,” the property of the plaintiffs. The picture or publication consisted of a painted gloved hand, having a fur cuff. It was made in cardboard, representing the back and palm of the hand, and opened bookwise; inside, on one of the “leaves,” which represented the palm of the hand itself, were what are termed in works of palmistry the “lines of life;” on the other “leaf” were a few lines of poetry, followed by a description, also in verse, of the “lines of life,” which were indicated by letters. Part of the description had been taken from one of the many works on palmistry. This picture was first published in May 1889, for circulation as a Christmas card. Before commencing their action the plaintiffs registered the picture under the Registration Act of 1842 (5 & 6 Vict. c. 45), an Act for the protection of copyright in “books,” and also under the Registration Act of 1862 (25 & 26 Vict. c. 68), an Act for the protection of “paintings and drawings.” In February 1889 the artist who designed the picture assigned her interest in the design to the plaintiffs, but there had been no assignment by the poet of his copyright in the verses. The defendants subsequently issued, for advertising purposes, a design of a gloved hand, of exactly the same

shape in outline as the plaintiffs'. The name of the firm was printed outside on the cuff, which was there a plain surface, while inside, on one leaf, were the lines of life as in the plaintiffs' card, with a description of them below partly the same as that of the plaintiffs', and on the other an advertisement of the defendants' goods. It was not denied that the defendants' card must have been copied from the plaintiffs', but the defendants said they got theirs from a firm of advertising card manufacturers at Leeds. The defence was, that the plaintiffs were not entitled to protection under either of the two Acts under which they had purported to register. First, because their picture was not a "book" within the meaning of the Act of 1842; and secondly, because there had been no proper registration. *Held* (by Mr. Justice Kekewich), that although the plaintiffs' picture could not be said to be a book, it was a "sheet of letterpress" within the definition contained in sec. 2 of the Act of 1842; that under sec. 11, which made the certificate of registration which the plaintiffs had obtained *prima facie* proof of the proprietorship of the copyright, the Court had evidence that the Act had been complied with, and on that ground the plaintiffs were entitled to relief; and that, as regarded registration under the Act of 1862, there had been sufficient registration under that Act also; that, upon the balance of convenience and inconvenience, an interim injunction ought to be granted against the defendants. — *Hildersheimer v. Dunn*, High Ct., Ch. Div., 20 March.

COMPANY.—*Reduction of capital—Money expended in establishing company—Lost capital or capital unrepresented by available assets—Companies Act 1877 (40 & 41 Vict. c. 26), sec. 3.*—A company registered under the Companies Acts as a company limited by shares expended out of capital a certain sum of money in preliminary, agency, establishment, and extension expenses, for the purposes of establishing the company as an insurance office, and subsequently presented a petition for the confirmation by the Court of resolutions passed for the reduction of the capital of the company by an amount which included the greater part of the sum so expended. *Held* (by Mr. Justice North), that the sum so expended was not lost capital or capital unrepresented by available assets within the meaning of the Companies Act 1877, and that the petition must be dismissed. — *The Abstainers v. General Insurance Company*, High Ct., Ch. Div., 21 March.

COMPANY. — *Provisional liquidator — Official receiver — Companies Act 1862 (25 & 26 Vict. c. 89), sec. 85—Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63), sec. 4, sub-sec. 5—General Rules under Act of 1890, rule 32.*—A petition to wind-up a company having been presented by creditors, the petitioners applied for the appointment of a certain person as provisional liquidator. The question arose whether, having regard to the Companies (Winding-up) Act 1890, sec. 4, sub-sec. 5, and rule 32 of the General Rules under that Act, the official receiver should be appointed. Sub-

sec. 5 of sec. 4 of the Companies (Winding-up) Act 1890 enacts that, "The official receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition and before a winding-up order has been made." It is provided by rule 32 of the General Rules as follows: "(1) After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the company, and upon proof by affidavit of sufficient grounds for the appointment of the official receiver as provisional liquidator, the Court may, if it thinks fit, and upon such terms as may be just, make such appointment. (2) An order appointing the official receiver to be provisional liquidator prior to the making of a winding-up order shall bear the number of the petition in respect of which it is made, and shall state the nature and short description of the property of which the official receiver is ordered to take possession." *Held* (by Mr. Justice Chitty), that the power of the Court under sec. 85 of the Companies Act of 1862 of appointing provisional liquidators was left unimpaired by the Act of 1890; and that if a winding-up order was made, a question might arise whether the official receiver was not to be official liquidator. — *Re The Unionist Club Limited*, High Ct., Ch. Div., 33 March.

RESTITUTION OF CONJUGAL RIGHTS.—*Husband's petition—Non-compliance with decree—Application for allowance—Settled property of wife—Restraint upon anticipation—Matrimonial Causes Act 1884* (47 & 48 Vict. c. 68), sec. 3.—A husband having obtained a decree for the restitution of conjugal rights, which the wife failed to obey, petitioned the Court under 47 & 48 Vict. c. 68, sec. 3, for an order that the wife's property, or part of it, might be settled for the benefit of the petitioner and the children of the marriage. The registrar reported that the wife's income was £540, derived under a settlement made upon her marriage with the petitioner, and which was payable to herself for life, with a restraint upon anticipation. *Held* (by Lords Justices Lindley, Bowen, and Kay, reversing Mr. Justice Jeune), that there was no power to make such order as regards property which the wife was, by her marriage settlement, restrained from anticipating. — *Michell v. Michell*, Court of Appeal, 24 March.

CONTEMPT OF COURT.—*Press Association, Manager of—Liability of manager for news disseminated by Association.*—Application on behalf of the defendants in the action of *Gordon-Cumming v. Green and others* against Mr. E. Robbins, the manager of the Press Association, and against the printer of the *Echo*, for contempt of Court in publishing a paragraph representing that the defendants were not going to defend the action. The paragraph appeared in the *Daily News*, and it was supplied by the Press Association. The paragraph was headed, "The Baccarat Scandal," and it stated in substance that there would be no defence to the action, no cross-examination, and no attempt by the defendants to prove the allegations made against the plaintiff. This paragraph was copied into the *Echo* of

the same day, the 17th of March, but in a later edition of the paper was declared to be without foundation. The chief question now was, whether the manager of the Press Association was liable for statements made or news disseminated by the Association. The solicitors for the defendants asserted that this paragraph tended to prejudice against them the fair hearing of the case, and they asked for the name of the person who supplied the news: Mr. Robbins replied that the information reached them in the ordinary course from one of their representatives at the Law Courts, but declined to give the name. The defendants then made this application to the Court, and in his affidavit Mr. Robbins said that he was in no way responsible for the dissemination of news to the various newspapers; that he was not privy to the paragraph complained of, and that the duty of supervising and sending out the various items of news published by the Press Association is performed by the heads of the various departments and not by him, and that he is not consulted with respect to the various items of news, except on special occasions; and that the paragraph complained of was not shown to him, and that he knew nothing of it. *Held* (by Mr. Justice Cave and Mr. Justice Grantham), that the manager of the Press Association was liable for the statements made or the news disseminated by the Association, and that he ought to pay the costs of this application as between solicitor and client. The printer of the *Echo* was also convicted, but was not ordered to pay costs. —*Gordon-Cumming v. Green and others*, High Ct., Q. B. Div., 24 March.

DAMAGE TO CARGO.—*Contract of affreightment—Law of the flag—German law.*—By art. 504 of the German Mercantile Code, "The master shall take every possible care of the cargo during the voyage in the interest of those concerned therein. When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interest of those concerned in the cargo as their representative; to take their instructions, if possible, and so far as circumstances admit to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences and of the measures thereby rendered necessary. He is particularly, in such cases, authorised to discharge the whole or a portion of the cargo; in extreme cases, if on account of imminent deterioration or for other causes a considerable loss cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation and further transport; to reclaim it in case of capture or detention; or if it shall have been otherwise withdrawn from his charge, to take all extra-judicial and judicial steps for its recovery." According to the decisions of the German Courts, a sale of cargo under the above article is justified where the master does so after taking the best advice he can get, and in consequence thereof comes to the honest conclusion that it is in the interest of the cargo owners that it

should be sold; and the sale cannot be impeached because in the event it appears that it was prejudicial to the cargo owners. The German ship *A.* loaded at Singapore a cargo of pepper belonging to British subjects for carriage to England. The bills of lading were in English. The *A.* was a general ship. On the voyage the *A.* met with bad weather, and in consequence thereof put into Table Bay. The pepper was surveyed, and part of it was recommended to be there sold. This was done, and the remainder was carried to London. The cargo owners now claimed damages from the ship-owners for improperly selling the pepper at Table Bay. According to the evidence it appeared that the best course in fact would have been not to have sold the pepper at Table Bay, but to have brought it to London. *Held* (by Lord Hannen), that the contract was to be determined by German law, that the master of the *A.*, in selling the cargo, had done so in the honest belief that he was acting for the best, and that therefore the shipowners were not liable.—*The August*, High Ct., Adm. Div., 24 March.

GIFT.—Chattel capable of delivery—Passing of property to donee—Delivery first and gift afterwards.—In 1848 a portrait, upon the death of its then owner, came into the possession of A., with other pictures. A. not having room for the pictures, one of his sisters took charge of the portrait, and another sister took charge of the other pictures. In 1865, A.'s two sisters being dead, the portrait was placed by B., the husband of one of the sisters, with the other pictures at A.'s request. In 1867 B. died, and A. entrusted B.'s son, C., with the care of the pictures, and they were kept in C.'s house. In 1879 A. died, and by his will the pictures became the property of D., who, together with C., was appointed A.'s executor. In October 1879 C. mentioned to D. the circumstance that the pictures belonged to the latter, and especially drew his attention to the portrait. D., however, said that he had a very good copy, and that he did not then want the original; but C. deposed that he did not then understand D. as meaning that he was giving him the portrait, but only that he allowed it to remain in his custody. The portrait being subsequently again referred to by C. in a letter, D. wrote to C. a letter, in which he said that he gave to him the portrait, and that he, C., would therefore retain it, of course. C. replied that until then he did not understand that D. had given him the portrait, and thanked him for it. D. died in September 1880. Early in 1884 his widow died, and in August 1884 his residuary legatee asked C. for the portrait, and was told by him that it had been given to him. The residuary legatee claimed the portrait as having passed to her under the will of D. It was contended on her behalf that the authorities showed that a verbal gift of a chattel capable of delivery could not pass the property in the chattel without actual delivery, and also that, even if delivery was unnecessary, the acceptance of the gift should have been made simultaneously with the actual date of the gift. *Held* (by Mr. Justice Chitty), that, according to authorities cited in *Cochrane v.*

Moore (25 Q. B. Div. 57, 69) and *Winter v. Winter*, delivery first and gift afterwards of a chattel was as effectual as gift first and delivery afterwards; that, although C.'s original possession of the portrait was only that of bailee, yet after the transactions in 1879 he ceased to possess the picture in his character of bailee, and his possession became that of owner; and that, even assuming that at the time of the gift there was no final acceptance, what took place subsequently was sufficient to constitute a complete gift. *Held* also, that the residuary legatee's claim was further barred by the Statute of Limitations, and must therefore be dismissed with costs.—*Alderson v. Peel*, High Ct., Ch. Div., 8 April.

SPECIFIC PERFORMANCE.—*Agreement to purchase lease*—"Usual covenant"—*Covenant against assignment without consent*—*No notice of covenant*—*Right of purchaser to refuse to complete*.—Appeal from a judgment of the deputy County Court judge sitting at Wandsworth. The action was brought to recover a sum of £25 alleged to have been received by the defendant as agent for the plaintiff. The plaintiff was desirous of disposing of the lease of certain premises which he held as lessee, and where he carried on the business of a greengrocer. He placed the matter in the hands of Mr. Taylor, the defendant, who was an auctioneer, for the purpose of disposing of the same. Mr. Taylor introduced one Mr. Harris as an intending purchaser; and in the result an agreement was entered into between the plaintiff and Harris, dated August 30, 1890, whereby Harris agreed to purchase the lease from the plaintiff for the sum of £225, the sale to be completed by September 29, and Harris to pay a deposit of £25. The agreement was silent as to whom the deposit was to be paid if the sale was not completed. The deposit of £25 was paid over by Harris to the defendant Taylor according to the agreement, but the purchase was not completed by September 29, and Harris refused to complete the agreement and to purchase the lease, because, as he alleged, the lease contained an onerous covenant which was not disclosed to him prior to his signing the agreement on August 30. The covenant complained of was, that the lessee was "not to assign or part with the possession of the premises without the consent of the lessor, such consent not to be unreasonably withheld." Harris said this was an onerous covenant, and he refused to complete. The plaintiff then brought this action against Taylor for the recovery of the £25 deposit; Taylor refused to pay it, as it was also claimed by Harris. Taylor was a mere stakeholder, and was willing to pay it to the party entitled to it. The deputy judge held that the covenant was not such an onerous covenant as would entitle Harris to refuse to complete, and he gave judgment for the plaintiff. Harris appealed. *Held* (by Mr. Justice Smith and Mr. Justice Grantham, allowing the appeal), that the covenant was an "unusual covenant" within the meaning of the judgment of Sir G. Jessel, M. R., in *Hampshire v. Wickens* (7 Ch. Div. 555), and that Harris was not bound to complete, as he had no notice of the covenant.—*Bishop v. Taylor & Co.*, High Ct., Q. B. Div., 8 April.

SHIP.—Charter-party—Advance freight to be paid “if required”—*Ship and cargo lost—Requirement first made after loss—Charterer not liable to pay.*—This was an action to recover a sum of £245 for advance freight under a charter-party. The defendants chartered the plaintiffs' ship to load a cargo of coals at Hull for Odessa, the freight to be paid on unloading and right delivery of the cargo. The charter-party contained a provision as follows: “One-third freight, if required, to be advanced, less 3 per cent. for interest and insurance.” The cargo was loaded and the vessel left Hull, and within three-quarters of an hour took the ground, and in the course of the same day became a total loss. Shortly after the loss, the plaintiffs, for the first time, demanded one-third of the freight as advance freight, but the defendants refused to pay. At the trial, without a jury, the learned judge gave judgment for the plaintiffs for the amount claimed. The defendants appealed. *Held*, that the charterers were not liable to pay the advance freight, inasmuch as the requirement to pay it could not be made after the vessel and cargo were lost.—*Smith, Hill, & Co. v. Pyman, Bell, & Co.*, Court of Appeal, 8 April.

NATIONAL DEBT.—Consolidated Fund—Unclaimed stock and dividends—List of names—Inspection—Person not interested—Mandamus—National Debt Act 1870 (33 & 34 Vict. c. 71), secs. 51, 52.—The National Debt Act 1870 provides, by sec. 51, that all stock, no dividend whereon is claimed for ten years before the last day on which a dividend thereon becomes payable, shall be transferred in the books of the Bank of England to the National Debt Commissioners; and, by sec. 52, that immediately after every such transfer the name in which the stock stood immediately before the transfer, the residence and description of the parties, the amount transferred, and the date of the transfer, shall be entered in a list to be kept for the purpose by the bank in whose books the stock stands, which list shall be open for inspection at the usual hours of transfer. The applicant, who carried on the business of a next-of-kin and unclaimed-money agent, applied for a *mandamus* to compel the Bank of England to keep a list, and to produce the same for his inspection in pursuance of the above sec. 52. It was admitted that the applicant was not personally interested in any unclaimed stock or dividends, and that his object was to obtain the names appearing in such list, in order that he might advertise the same, and so obtain fees from persons who might think that they were entitled to the stock or dividends, for making further searches and inquiries on their behalf. *Held* (by Mr. Justice Smith and Mr. Justice Grantham), that, as the applicant was not himself *bond fide* interested, and was not acting on behalf of a person who was or might become *bond fide* interested in the contents of such list, the Court could not grant a *mandamus*.—*Reg. v. Governor, etc., of the Bank of England*, High Ct., Q. B. Div., 9 April.

COMPANY.—Directors—Appointment—Action brought by solicitors without authority.—Motion by the defendants claiming to be duly

elected directors of, and in the name of the plaintiff company, asking that all proceedings in the action might be stayed, on the ground that they had been instituted without the authority of the company, and that the solicitors by whom the writ was issued might be ordered to pay the costs of the action and of this application. The company was formed in 1890, under Table A of the Companies Act 1862, for the purpose of building premises for the John Morley Political Club. No proper appointment of directors was made, nor did the subscribers of the Memorandum of Association act as directors. Seven gentlemen, however, constituted themselves as directors, and proceeded to act as such. Disputes subsequently arose which resulted in the present action. Pending the disputes, the secretary of the company convened a meeting of the subscribers to the Memorandum of Association for the purpose of (*inter alia*) appointing directors. Ten out of the twelve subscribers attended, but two protested and withdrew. The remaining eight appointed the defendants as directors. The persons who had originally constituted themselves directors also made an effort to get themselves duly appointed by a document intended to be signed by all the subscribers to the Memorandum. It was, however, in fact, signed by seven only, and it appeared that the signatures of three of them had been obtained in a way which would invalidate the appointment. *Held* (by Mr. Justice Stirling), that, under art. 52 of Table A, the number of the directors and the names of the first directors were to be determined by the subscribers to the Memorandum of Association. The self-constituted directors had not been so appointed, nor had they ever been validly confirmed as such directors. It was suggested that the self-constituted directors, having been *de facto* directors, were continued in office by art. 62. But that article did not apply to *de facto* directors, nor did it, as had also been suggested, apply to continue in office the subscribers to the Memorandum of Association. But the subscribers to the Memorandum had not lost their power of appointing directors, and they exercised that power by appointing the defendants. The motion must therefore succeed, and the solicitors must be ordered to pay the costs personally.—*The John Morley Building Company Limited*, High Ct., Ch. Div., 9 April.

MASTER AND SERVANT.—*Employers and Workmen Act 1875* (38 & 39 Vict. c. 90), sec. 10—"Workman"—"Journeyman"—*Grocer's assistant*.—The *Employers and Workmen Act 1875* (38 & 39 Vict. c. 90), after giving justices jurisdiction to hear and determine disputes between employers and workmen, enacts by sec. 10 that "the expression 'workmen' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . ." The respondent, a grocer, laid a complaint against the appellant, an assistant in his employment, before a court of summary jurisdiction for leaving his service without notice. The appellant served cur-

tomers in the shop, made up parcels of goods, and carried parcels to the cart at the door, a porter being kept to do the heavy manual work. The justices held that the appellant was a workman within the meaning of the Employers and Workmen Act 1875, and awarded the respondent twenty shillings damages and costs. *Held* (by Mr. Justice Grantham), that the justices were right, as the appellant was a journeyman. *Held* (by Mr. Justice Smith), that the appellant was not a workman within the meaning of the Act.—*Bound v. Lawrence*, High Ct., Q. B. Div., 11 April.

TWO WILLS.—*No express revocation clause in second will—Both in custody of testatrix—First will only found—Probate of first will.*—Sarah Radcliffe died at Oldham, in the county of Lancaster, on 26th November 1889, a spinster, and without parent, leaving Ellen Radcliffe, her sister and only next of kin, her surviving. In December 1886 she duly executed a will, leaving all her property to Hannah Radcliffe and Ellen Radcliffe, her sisters, and appointing them executrices. Hannah Radcliffe died on 13th August 1887, in the lifetime of the testatrix, who, about the end of 1888 or beginning of 1889, handed her said will to the person who had prepared it, and requested him to make a fresh will by omitting Hannah Radcliffe's name therefrom. This will was duly executed shortly afterwards, and the testatrix took possession of it. After her death it could not be found, but the earlier will of 1886 was discovered in her repositories. The surviving sister Ellen had conscientious scruples about swearing that the said will of 1886 was the last will and testament of the deceased, well knowing that she had executed a subsequent will. She, for a similar reason, was not prepared to swear that the deceased died intestate. The result in either case would be that the whole property would go to Ellen Radcliffe, whether as sole beneficiary under either will, or as sole next of kin entitled in distribution to the property of the deceased. The Court was now moved on her behalf for probate to her, as executrix of the substance and contents of the last will as set forth in an affidavit filed by the person who prepared the will; or, in the alternative, she asked for probate of the earlier will. *Held* (by Mr. Justice Jeune), that as there was no revocation clause in the second will, and as it was in effect the same as the earlier will, the second will could not be said to effect a revocation of the first, and that probate should issue of the earlier will.—*In the Goods of Radcliffe*, deceased, High Ct., P. & D. Div., 14 April.

MARRIAGE SETTLEMENT.—*Power of appointment among children of marriage—Release of power by donee for his own benefit—Donee not entitled to declaration that he is entitled to share of fund.*—By a marriage settlement dated the 26th July 1852, real and personal estate was vested in trustees upon trust, to pay the income to the husband for his life, and after his death to the wife for her life, and after the death of the survivor of the husband and wife, upon trust for the children of the marriage as the husband and wife should by deed jointly appoint, and in default of such joint appointment as

the survivor should by deed or will appoint, and in default of appointment by the survivor, for the children of the marriage, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, whichever should first happen, in equal shares. The wife died in 1857. There were three children of the marriage, one of whom died in infancy, and another attained twenty-one, and died in 1881 a bachelor and intestate; and letters of administration to his personal estate were granted to his father in 1882. No joint appointment of the property among the children was made by the husband and wife, or by the husband alone, and the latter executed a deed poll, dated the 9th July 1890, by which he absolutely released the power of appointment given him by the marriage settlement. The husband then, as administrator of the estate of his son, took out a summons against the trustees of the settlement, asking for an order, under Order LV. r. 3, declaring that he was entitled in the events which had happened to a moiety of the property comprised in the marriage settlement, and that the same moiety might be transferred and paid over to him. It was contended by the trustees of the settlement that they were prevented from transferring and paying over to the husband a moiety of the settled property by the decision in *Conyngame v. Thurlow* (1 Russ. & M. 436, n.), where Sir L. Shadwell, V.C., held that the Court ought not to give present effect to a release by a father of his power of appointment over a fund, so far as it operated to vest a share of the fund in the father as executor of a deceased son, and refused to order a transfer of the deceased's son's share to the father. It was contended for the plaintiff that this decision did not prevent the Court making the declaration asked for, and that the case of *Conyngame v. Thurlow* had not been followed on this point in the later case of *Smith v. Houbton* (26 Beav. 482). Held (by Mr. Justice North), that the decision in *Conyngame v. Thurlow* was still binding, and that no declaration of the plaintiff's rights ought to be made, although his power of appointment had been effectually released.—*Re Radcliffe's Settlement*; *Radcliffe v. Bewes*, High Ct., Ch. Div., 14 April.

LANDLORD AND TENANT.—*Tenant for life—Executors of tenant paying compensation to outgoing tenant—Right of executors to apply for charge on lands—Agricultural Holdings (England) Act 1883, sec. 29.*—Appeal from Wells County Court. A petition was presented in the Wells County Court by the executors of the late John Gough, asking for an order charging a sum of £35 upon a certain holding, under sec. 29 of the Agricultural Holdings (England) Act 1883. The late John Gough was tenant for life of a certain farm, and in 1886 he let the farm to a Mr. Huggett as tenant from year to year. In 1889 Mr. Huggett, the tenant, gave his landlord notice of his intention to quit the farm at Ladyday 1890, and in January 1890 he served on the landlord notice of claim for unexhausted improvements on the farm under the provisions of the Agricultural Holdings Act 1883, and on the 2nd April the landlord served on the tenant

notice of a counter-claim for £80 for dilapidations. On the 5th April, two valuers, who had been appointed, awarded the tenant £90 and the landlord £55, thus leaving a balance in favour of the tenant for £35. On the 8th April John Gough, the tenant for life, died, having been up to that time in receipt of the rents and profits of the lands as owner for life. On the death of John Gough the ownership then passed to the remainderman. On the 24th April the executors of John Gough, the deceased tenant for life, paid the £35 compensation to the tenant, and they then claimed a charge upon the holding for that amount. The only question was whether the petitioners, the executors of the deceased tenant for life, were entitled to this charge under the 29th section of the Act. Section 29 enacts that "a landlord, on paying to a tenant the amount due to him in respect of compensation under this Act, shall be entitled to obtain from the County Court a charge on the holding to the amount of the sum so paid." By sec. 61, "landlord" means any person for the time being entitled to receive the rents and profits of any holding; and "tenant" includes executors, administrators, etc., of the tenant. The learned judge held that the order could not be made, as sec. 29 speaks of the "landlord" applying for the order, and the word "landlord" by the section does not include executors, whereas "tenant" includes executors; and that, as the tenant for life had died before the sum was paid to the tenant, the executors, who never were entitled to receive the rents or profits, were not entitled to apply for the order. *Cur. adv. vult.* Held (by Mr. Justice Cave), that the judgment of the County Court judge was right, and that the executors of the deceased tenant for life were not entitled to apply for a charge under sec. 29. Held (by Mr. Justice Williams), that the executors were entitled to apply for the order. Appeal dismissed. Leave to appeal.—*Gough v. Gough and others*, High Ct., Q. B. Div., 14 April.

LOCOMOTIVE ON HIGHWAY.—*Construction of locomotive*—*To consume its own smoke*—*Locomotive emitting smoke*—*Onus of proof as to construction*—*Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 70), sec. 30.*—It was provided by the Locomotive Act 1861 (24 & 25 Vict. c. 70), sec. 8, that "every locomotive propelled by steam or any other than animal power to be used on any turnpike road or public highway shall be constructed on the principle of consuming and so as to consume its own smoke." That section is repealed by sec. 30 of the Highways and Locomotives (Amendment) Act (41 & 42 Vict. c. 77), which provides that, in lieu thereof, be it enacted that every locomotive used on any turnpike road or highway shall be constructed on the principle of consuming its own smoke; and any person using any locomotive not so constructed, or not consuming, so far as practicable, its own smoke, shall be liable to a fine. The appellant was summoned before a court of summary jurisdiction for using on a highway a locomotive not constructed on the principle of consuming its own smoke, and not consuming, so far as was practicable, its own smoke. It was contended on his

behalf that the prosecution must prove that the locomotive was not constructed, so far as was practicable, so as to consume its own smoke. The justices held that, the prosecution having proved that the engine was emitting smoke, the onus of proving that it was constructed, so far as was practicable, so as to consume its own smoke, was upon the appellant. The appellant was convicted. *Held* (by Mr. Justice Smith and Mr. Justice Grantham), that the justices were right, and that the prosecution having made out a *prima facie* case, the onus of proof shifted on to the appellant.—*Pitt-Rivers v. Glasse*, High Ct., Q. B. Div., 14 April.

ALIMONY "PENDENTE LITE."—*Cross-examination of husband—Husband in partnership—Subpoena duces tecum served on husband and his partner—Refusal to allow inspection of partnership ledger on its production—Attachment—Divorce Court Rule 191.*—Motions for attachment, or for committal for alleged contempt of court in not obeying *subpoena duces tecum*. The wife filed her petition for divorce, and also for alimony pending suit. The husband admitted that he had a very substantial income at the date of the marriage, but stated, in his answer to the alimony petition, that he had made a loss in his business of a broker and bill discounter, and that his estates were mortgaged to such an extent as to be unproductive in the present state of agricultural depression. He had settled £250 a year upon his wife, for her separate use, at the time of his marriage, and this income she still received regularly under that settlement. He also offered, upon more than one occasion during the alimony proceedings, with the object of saving all the expense and worry and annoyance of such proceedings, to allow his wife a further sum of £250 per annum until the hearing of the divorce suit, so that her income, pending suit, would be £500 a year; but this offer was declined by the wife. The registrar having refused, upon summons, to make an order for the inspection of the books of the respondent's firm, a *subpoena duces tecum* was served upon the respondent, and a similar subpoena was also served upon his partner, to produce before the registrar the books of the firm, showing how the account filed by the respondent in his answer had been arrived at. Accordingly, upon March 25, the respondent and his partner attended before the registrar and produced the ledger of the firm, but they each declined to allow the wife's legal advisers to see the inside of the ledger, upon the ground that it contained entries of the business of a third party, viz. the partner, who was not a party to the suit, and who would, or might, be damaged by the disclosure of the documents or entries in question. The registrar having intimated that, in his opinion, the book should be inspected by the wife's advisers, the further point was then taken by *Durley-Grazebrook*, for the husband, that proceedings in relation to alimony *pendente lite* were not "the hearing" of the alimony or maintenance proceedings, but were only with the object of supplying the wife with the temporary means of adequately supporting herself until the final decision of the cause or action, and that

whatever the rights of the wife or the power of the Court after a final decree for divorce or judicial separation might be, the present was not the proper time for requiring or ordering the production of the said books under *subpoena duces tecum*. The respondent, acting under legal advice, refused inspection of the ledger, and, on behalf of the wife, the Court was now moved to commit the respondent and his partner for contempt of court, or to attach them for refusing to produce the ledger or other partnership books in compliance with their subpoenas. *Held* (by Mr. Justice Jeune), that this case was covered by rule 191 of the Rules and Regulations in Divorce and Matrimonial Causes, and that the order for attachment should be made against the respondent and his partner, but that the said order should lie in the office for ten days, to enable an appointment to be made by the registrar, and for the books to be produced before him, upon such appointment, for inspection, in the registrar's presence, by the wife's advisers.—*Carew v. Carew*, High Ct., P. & D. Div., 15 April.

Sheriff Court Reports.

SHERIFF COURT OF STIRLING.

MACDONALD v. TOD.

The Debts Recovery Act.—This was an action at the instance of Alexander Macdonald, sheep contractor, Forrest Burn, Shotts (pursuer), against James Tod, farmer, Binns, near Denny (defender), in which action the pursuer sues the defender for the price of "wintering 423 sheep belonging to you, at 5s. per head, at Forrest Burn, Bogend, and Redburn, you having, on 18th January 1891, illegally and without just cause, removed said sheep under cloud of night, and refused to pay the rent of said wintering, £105, 15s., restricted to £50 sterling." The defence stated was that the pursuer was not wintering the sheep as contracted for, and in consequence the defender removed his sheep after intimating to the pursuer that he would do so; and pleaded in law—(1) The action as laid is incompetent, in respect that the debt alleged to be due and sued for does not fall within the classes of debts described in section 2 of the Debts Recovery (Scotland) Act, 1867. (2) The pursuer having failed to implement his part of the contract between the parties, and the defender having thereby suffered loss to an extent largely exceeding the sum sued for, the defender is entitled to be assoilzied. The pursuer denied the defender's averments, and repeated the conclusions and averments in his summons, and pleaded in law that the defender being due the sum sued for, the pursuer is entitled to decree as craved in the summons, with expenses. At the debate at the court a week ago, on the first plea for the defender, that the action was incompetently brought under the Debts Recovery Act, the agent for the defender contended that

the debt sued for being for rent for an agricultural subject, such debt was excluded by the Act, and he quoted an *obiter dicta* Sheriff-Substitute Dove Wilson in his book on Sheriff Court Practice in support of this. The pursuer's agent contended that the defender was mistaken, as the debt was not a rent, but an ordinary claim for wintering the sheep, and was nothing other than a "merchant's account," and "other the like debt," which the Act expressly enacts can be sued for. Besides, even were the claim one for rent, the Act does not exclude a claim being sued for under it for the rent of an agricultural subject, provided the same is founded on a written lease or obligation; and in support of these contentions he quoted several cases which had been tried under the Act, from the reports supporting these contentions.

Sheriff-Substitute Buntine delivered the following interlocutor holding the pursuer's contentions correct, viz.:—

"*Stirling, 31st March 1891.*—Having heard parties' procurators on the first plea for defender, Repels the same: Appoints the cause to be enrolled at next court to fix a diet for the trial of the cause."

"J. R. BUNTINE

"*Note.*—This is an action for recovery of a sum of money where the pursuer alleges that the defender had bargained to give him a certain number of his sheep to feed in his (pursuer's) grass land from October last to April 10th of this year. In other words, the pursuer desires to recover 5s. per head for every sheep belonging to defender which was wintered on his farm. The defender replies that the wintering which was given was according to bargain, and that he was justified in removing the sheep as he did in January last, and in declining to pay any part of the stipulated 5s. per head. The question thus raised is one uncommon among farmers and cattle or sheep owners, and is certainly one which it would be convenient to try under the summary provisions of the Debts Recovery Act. The Sheriff-Substitute was unable to accede to this view of the claim. No doubt the equivalent for the money bargained for was the enjoyment of the use of an agricultural subject, but in his opinion there was no lease of a part of the land belonging to the pursuer. The claim is not one for damages for breach of contract, but rather for the price condition in the contract, on the footing that pursuer has implemented a part of it, and is entitled to demand that the defender should do the same. The two parties to the action were, in truth, engaged in a commercial transaction, and the summons is the result of a dispute thereanent. The claim accordingly may, in the Sheriff-Substitute's opinion, be regarded as a merchant's account, or, at all events, 'as another the like debt.'

J. R. B.

Act. D. W. Logie—Alt. Welsh.

All communications for the Editor to be addressed to the care of the Publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The Impunity of Perjury.—Some time ago we dwelt at length on the wide prevalence of perjury, and on the almost complete impunity with which it can be practised. The writer who recently furnished to one of the magazines a humorous article on "The Decline of Lying," was miserably unacquainted with the Law Courts of his country. Prosecutions for perjury are scarcely known: convictions are still rarer, if that be possible. Nothing is easier than lying; and lying on oath is not perceptibly less easy than lying informally, as, for example, on a tombstone. Unless a man lie right in the face of documents or patent facts, he may invent his own evidence with perfect safety and literary effect. And, even if he should run against an awkward obstacle of the kind, it is always open to him to *explain*. Direct proof of perjury it is extremely difficult to find. Without direct proof, apparently, prosecutors do not care to venture on a charge. Nor need this cause wonder; for stupid men, and hasty men, and simple men are so rife in the world that there always lurks just a faint possibility of convicting an innocent person. The Attorney-General was asked in the House of Commons the other day whether he would call the attention of the Public Prosecutor to the case of *Evelyn v. Hurlbert*, with a view to seeing whether sufficient evidence existed on which to base a prosecution of one or other of the parties to

the suit for perjury ; and in reply he said that there must be the most careful investigation as to whether any or either of them can be convicted of that crime. A sensational case has thus its uses in bringing into prominence ugly features which are by no means less common in obscure and humdrum actions. We again repeat our humble opinion, that prosecutors ought to be a little more courageous in cases of perjury. Skilled witnesses, of course, we can never hope to reach by a charge of this kind. A skilled witness of experience never commits perjury. His is an innominate offence. But there ought to be some *nomen juris* invented to cover the practice of maintaining that the laws of nature and of logic are by no means uniform in their operation, and that science says black or says white according as the pursuer or defender has cited you.



The English Judicature Acts.—Naturally, and very properly, there is no finality in the regulation of judicial procedure. Progress must be incessant—consolidation, simplification, abridgment; expedients by which to cope with the increasing volume of business; economy, etc.—the directions of improvement are manifold. The English Judicature Acts effected sweeping reforms. They went a great length in abolishing cumbersome procedure, and in blotting out arbitrary distinctions. But the machinery thereby substituted, perfected as it has been since, has not proved quite adequate. Dissatisfaction with the state of business is becoming more and more noticeable. The arrears in the Supreme Court are very formidable. The Attorney-General admitted in the House the other day that there are nearly five hundred causes, besides motions, petitions, etc., awaiting a hearing in the Chancery Division, and over *fifteen hundred* in the Queen's Bench Division; and he admitted the substantial accuracy of his questioner's estimate that, at the present rate of progress, and with all the judges working hard, it would take more than twelve months to try them, irrespective of new causes. Mr. Atherley-Jones gave notice on the following day of a motion for the appointment of a Royal Commission for the purpose of inquiring how far the Judicature Acts

have contributed to the more speedy, efficient, and economic administration of justice, and in what respects amendment thereof is desirable. This Commission, however, will not be appointed. On a later day the First Lord of the Treasury announced that the Government do not propose to institute any such inquiry, inasmuch as the principal Judicature Act, which followed on a Royal Commission, is of so recent origin, while the Acts and regulations for the relief of business at the assizes and for clearing the lists in London have been scarcely a year in operation. Meantime the Government are considering the expediency of appointing another Chancery judge. Possibly, therefore, for the present, business may be brought up to date by a special effort of the judges, as happened recently in our Scottish Courts, without any drastic reform.

* * *

Quod principi placuit.—*Sed et quod principi placuit, legis habet vigorem*; Beer-drinking carousals and duelling have been commended and recommended by the Emperor of Germany at Bonn. Addressing the beer-drinking and swashbuckler students of the University in that town, he informed them that these practices “give a direction to life.” In all humility we venture to agree with His Imperial Majesty. Beer-drinking must give a direction to life—what direction need not be specified. Into the merits of German duelling we do not enter. But it is to be noted that in a moment of enthusiasm this constitutional monarch has been recommending, to a considerable section of his subjects, the pursuit of a practice which is contrary to the laws of the land he rules. Within his dominions it is illegal to carve designs on the face of a friend with a piece of steel prepared for the purpose. Surely this must be one of the rescripts *quæ nec ad exemplum trahuntur*!

* * *

Expositions Expounded.—The Clitheroe abduction case has been the means of showing us many things. It has shown us, amongst others, how valuable it would be were all judges to be members of the House of Lords or of the House of Commons. Opportunity would thereby be afforded them to

re-expound their expositions of the law—to state afresh what dull brains or hysterical prints may have misapprehended, or even to correct, on reflection, slight slips of their own. There are few places, from pot-house to Parliament, where the Jackson case has not been fought over again and again; and the subject has even penetrated into the House of Lords, as a legislative chamber. When it came up, Lord Esher took occasion to state the result of the judgment briefly and lucidly, and with sarcasm which was well warranted. The judgment, he maintained, had been more misunderstood than any judgment he recollected. “It was urged before the Court of Appeal,” said his lordship, “that by the law of England a husband may beat his wife with a stick if she refuses to obey him, and that if a wife refused her husband conjugal rights—whatever that phrase may mean, which I have never been able to make out—he may imprison her until she restores him conjugal rights, or satisfies him that she will. All that the Court of Appeal decided was that a husband cannot by the law of England, if the wife objects, lawfully do either of those things. Those intelligent people who have declared that the judgment is wrong, must be prepared to maintain the converse, viz. that if a wife disobeys her husband, he may lawfully beat her; and if she refuses him a restitution of conjugal rights, he may imprison her—as it was urged—in the cellar or in the cupboard, or, if the house is large, in the house, by locking her in it and locking the windows. I thought, and still think, that the law does not allow those things. The intelligent objectors say that by so holding we make a decree for the restitution of conjugal rights a farce, so that it is a farce to grant it; and that a magistrate ought not, or even cannot, give a protection order to a wife. They may rest assured that the Court did not hold any such nonsense. If there is a difficulty in enforcing a decree for restitution of conjugal rights, it is caused by the Legislature, which lately took from the Divorce Court the power of imprisoning a wife for contempt for refusing to obey such a decree. But perhaps it may appear absurd to the intelligent critics. We do not think that by taking away from the Court a power which the Legislature thought as oppressive and unnecessary, the Legislature meant to

give to the husband the power of perpetual imprisonment, which it took away from the Court. We thought, and I still think, that the judge of the Divorce Court may grant a decree, and the magistrate may make an order, and that they need not attribute to the Court of Appeal decisions which, if they had read the decision, they would probably have seen that the Court of Appeal did not arrive at."



"*Nationalisation*" of the *Advocates' Library*.—The proposal to nationalise the library at present belonging to the Faculty of Advocates is not new, or merely second-hand, or third-hand. It is an ancient and recurring proposal. There has been a new proposer, however. In the end of last month Professor Masson wrote to the *Scotsman* newspaper, suggesting that part of the equivalent grant out of the Budget surplus should be used for the purpose of making this library a national one. We have explained our views on this subject before, and need not repeat them now. We shall not do the learned professor the injustice of supposing that by nationalising this valuable and unique library, he means to make it merely a convenient *annexe* of Mr. Carnegie's advertisement on George IV. Bridge. He intends, of course, that it shall be *the property* of the nation. It is *available* to the nation already.

Special Articles.

THE TAXATION OF FEU-DUTIES.

THE clamour raised in certain quarters for what is termed the taxation of feu-duties and ground-rents is characterised by so complete an absence of any reasonable grounds for the demand made, as to render it extremely difficult to suppose that it represents anything else than a thinly disguised attack upon ownership generally. Seeing that those who are crying out for this so-called taxation must blind themselves to the whole plain facts of the position, it would, probably, have but little soothing effect upon them if one were to assure them that feu-duties and ground-rents *are* taxed. But as this clamour may

mislead others who do not give full attention to the subject, it is proposed here to review shortly the simple facts of the case, and thereafter consider certain matters which the situation suggests very naturally.

Although the feu-duty of Scotland is not the equivalent in conveyancing of the English ground-rent, still the position of the estates, or legal interests in land respectively represented by them, as regards the demand for their taxation, is identical. The ground-rent of England is the consideration of a building lease for years—99 years, for instance, being a common period, and being the period for which limited owners under the Settled Land Acts, 1883–90, may grant building leases. The feu of Scotland really represents a sale of the land, only instead of the whole price being paid down in a slump sum, it is payable in the shape of a perpetual annuity. In England such a title is uncommon, as the statute *Quia Emptores* in the year 1290 practically made subinfeudation in future impossible, and any tenures in England held of a subject must date in creation prior to that Act. Where they still survive—principally in manors—they are known as quit-rents, or chief-rents. Lapse of time has made such tenures difficult to trace, and this, combined with the smallness of the amount of the sum payable, has resulted in the knowledge of their existence becoming rare. Moreover, recent conveyancing legislation has authorised the compulsory redemption of these quit-rents, just as in the case of the casualties of a Scottish feu; and this legislation will be referred to later on. In Scotland, when subinfeudation was contractually prohibited in particular cases, the device of the ground-annual was commonly resorted to, and, similarly, the universal statutory prohibition in England produced the expedient of the rent-charge. But the authorities all tell us that a rent-charge was at variance with the principles of the common law, and therefore not favoured by the Courts.

It is remarkable to note that, in this question of subinfeudation, English and Scottish conveyancing have now arrived at opposite poles. In England subinfeudation became incompetent in 1290, and has remained so ever since; in Scotland, it was only in 1874 that a clause in a feu-charter prohibiting binfeudation was made invalid.

We are now in a position to consider how feu-duties in Scotland and ground-rents in England stand together in this demand for what is called their taxation, but which it would be true to term their further or double taxation. The question, in the first instance, is essentially one of contract in Scotland and in England alike. The owner of ground in Scotland grants his land in feu, or, in other words, sells it for a price payable as a perpetual annuity, and it is a part, and an obvious and necessary part, of the contract, that the feuar should pay the taxes attaching to the ownership of property on the full value of the land and buildings, as determined in accordance with the Lands Valuation Acts. If this clause were not an obvious and necessary part of the contract, it would be as reasonable that when an owner of ground sells it outright for a slump sum, which he places in bank or invests in some form, he should still be taxed in respect of that investment as referable to the land which he has sold and completely divested himself of. Nor is the local community, whose taxable area comprises the land granted in feu with this clause, deprived of a single coin of the full taxation. Thus a feu is granted, say, for a duty of £10 per annum. The grantee of the feu then builds a house thereon, which he lets, say, for a rent of £100 per annum, or, if he occupies it himself, the assessor values it at that figure, and all local taxes are paid as charged upon the basis of that rental, that is to say, the full value. Those who are clamouring for taxation of feu-duties have not, so far as the writer has seen, condescended to say whether, if such a feu-duty as the above case of £10 were taxed, in the sense they demand, they would deduct such sum of £10 from the rent, as determined for payment of taxes by the feuar, who would then pay on £90 only. If they do not allow such a deduction, but insist upon still taxing the feuar on the full assessable rental of £100—£10 of which, however, is really feu-duty, and the feuar is merely the superior's collector—then it is clear that a sum of £10 is taxed twice, and such a charge would not be taxation, but would be further or double taxation. If, on the other hand, they do allow this deduction of £10, being the amount of the feu-duty, from the rental in fixing the basis of taxation payable by the feuar, then these people,

without conferring one farthing of benefit on the local rates, gratuitously interfere in the terms of a contract deliberately agreed to and entered into by private individuals. In fact, what the demand for taxation of feu-duties would then mean would be this, that after A and B have completed a formal sale of a house, by which B has acquired the ownership thereof by payment of £1000, then at any interval of years A or A's heir may be called by these would-be legislators to repay, say, £100 to B; so that the sale shall be one not at £1000, as agreed to by the parties, but at £900, as fixed by other parties who have no possible interest in the question. How clearly and necessarily is it a part of the conditions of a feu that the vassal is to pay the taxation upon the whole value, is easily seen from the fact, that when a superior contracts to pay any part of such taxation, it must be specifically expressed, and the Court construes the limitations of such relief by the superior stipulated in favour of the vassal very strictly; hence the many questions, such as that of what is comprised under a clause of relief of public burdens by the superior in his grant of a feu.

In England the matter falls to be determined alike on the ground of contract. There the ordinary rule is that a tenant for years—the relation of landlord and tenant—pays all the taxes. To tax the owner of the ground-rent would be the equivalent of taxing feu-duties here, i.e. it would either mean a deliberate and gratuitous interference with a private contract, or it would not only be such an interference, but also a double taxation of one and the same source of revenue or income. In Roman law, the *emphyteuta* paid the whole taxation, on the same principles as the Scottish feuar or the English tenant for years does.

But although this demand for the so-called taxation of feu-duties and ground-rents is so manifestly ill-founded and unreasonable, that it is not easy to see how the demand can be seriously made, yet it does not follow that in the case of feu-duties, at all events, legislation may not be advisable, or, it may be perhaps said, will not certainly come. Reference has already been made to a recent English Conveyancing Act,* which enables parties to compel the redemption of quit-rents,

* 44 and 45 Vict. c. 41, § 45.

chief-rents, or rent charges in certain circumstances. Although quit-rents or chief-rents are in descent the equivalent in feudal conveyancing of the Scottish feu-duty, yet their history since the statute of *Quia Emptores*, as has already been pointed out, makes their position so different from their Scottish congeners, that it would not be wise to found any argument on them to apply to Scotland. But the redemption of rent charges offers a good analogy. Therefore, on comparative as well as on independent grounds, the question may be seriously asked, Would it be wise and just to enable all feu-duties to be compulsorily redeemed, and so practically abolish them? England answered that question practically so long ago as the year 1290 in the statute *Quia Emptores*, prohibiting subinfeudation; and that answer was formally complete when, in 1881, a section of the Conveyancing Act of that year authorised the compulsory redemption of such quit-rents as had survived those six centuries,—for none could have been created since the year 1290.

Of course it is obvious that the existence of feus is now a mere survival of a form without the realities of a past age, and that there is now no *raison d'être* for them; the circumstances of the society which called the system forth are totally changed, the *essentialia* of the feu are gone. Is there any counterbalancing advantage to justify the retention of such a survival of the past? A prominent argument for the retention of the feu-duty is, that it is "a favourite form of investment." If an institution is shown to be useless, much more if it is shown to be positively detrimental, it is hardly then the duty of the State to retain it merely as a good form of investment for its subjects. A feu-duty is simply a real burden which the true owner cannot shake off, a bond which he cannot pay off, a veritable legal Old Man of the Sea. It is a compulsory dual ownership of a kind that is far from desirable. Legislation always has been and is tending to the removal and prevention of such restrictions on and hindrances to a true and simple form of land ownership. In Scotland recently, casualties—the incidents of a feu—were made redeemable, and the future creation of "casualties" strictly so-called made impossible. In England, in 1881, a term of years, of not less than 300 years, of which at least 200 were

still to run, was in certain cases made capable of enlargement into an estate in fee-simple. We may well consider in such matters before we refuse to follow the lead of England, for she has always been ahead in placing on the Statute Book enlightened and broad views in the department of land legislation. Witness the great advance, as compared with Scotland, in the law of land ownership as shown in the Settled Estates Acts, 1882-90, conferring a freedom on various classes of limited owners, without disregard of ulterior rights, which is unknown on this side of the Border. It cannot, in the opinion of the writer, be denied that there are at least strong arguments in favour of the view, that legislation which would offer compulsory redemption of feu-duties and prohibit the creation of them in future, would be wise and beneficial. The legal fiction of the feudal relation of superior and vassal as still existing, merely to make it possible to constitute a perpetual real burden, is probably a legal fiction that has much evil without any compensating good. If all the din about the "taxation" of feu-duties should result in giving rise to a wise discussion of this latter question, it will after all have served a good end.

W. J. N. L.

THE SUMPTUARY LAWS OF SCOTLAND.

WE have been accustomed to think of the Scots as a proverbially frugal people, and of their land in times past as furnishing but the scantiest means of subsistence to its frugal inhabitants. It stands out in our recollection that in the course of the protracted strife between Scotland and England, the invading armies of the latter found in Scotland an all but barren wilderness, where the want of supplies was often the cause that drove them backward home. In later times the absurd jealousy against the Scots ("the mad and wicked rage" as Hume calls it, *Letters*, p. 49), when they flocked southwards to the common court of the kingdom, took the form of taunts about their poverty at home, and they were universally represented as needy, half-starved emigrants, come to prey on the sleek plenty of the more fortunate English. Literary fiction has perpetuated, and has no doubt exaggerated, this notion. Yet it is well founded in fact, though

requiring to be qualified to some extent (see *e.g.* "The Inquiry into the Ancient State of Scotland" in Tytler's *History*).

It is the more striking, on this account, to turn to the series of Scots enactments known as the Sumptuary Laws. These are statutes which were passed from time to time for the purpose of restraining the extravagant propensities of these same frugal Scotsmen and Scotswomen. In contradiction of the traditional conceptions of the Scottish character, they point to the prevalence of reckless and luxurious expenditure in excess of the means of the spenders. While they support the well-established poverty of the country, they throw grave doubts on the right of our predecessors to a reputation for frugality. The Act of 1457, c. 70, for example, proceeds on the preamble, "That the realme in ilk estaite is greattumlie pured throwe sumptuous claithing, baith of men and women, and in special within burrowes and commouns of landwart." That of 1471, c. 45, again, was passed in consideration of "the great povertie of the realme, the greате expences and coast maid upon the in-bringing of silk in the realme." The Act of 1621 "anent Banqueting and Apparel" bears to have been passed in consequence of "the great hurt comming unto this country by the superfluous usage of unnecessary sumptuousness in meat, apparel, and otherwayes: and that by all sorts of people, promiscuously, without distinction of persons, of ranks or quality." Practically the same preamble is the basis of the Statute 1672, c. 10; and that of 1691, c. 14, is intituled an "Act for restraining the exorbitant expence of marriages, baptisms, and burials."

One may therefore be pardoned for questioning the title of these bygone Scots folk to pose as a simple, frugal people, content with homely and scanty dress, and with the plainest of food in the most meagre quantities, careful to a niggardly degree of their scarce *barbees*. On the contrary, to judge from the number of these enactments, and the long period of time over which they extend, the inhabitants of Scotland appear to have been possessed by a very persistent spirit of extravagance, limited neither to one generation nor to one class of the community. The first of the Sumptuary Laws was passed in 1429; the last in 1698—the primitive subjects of King James I. having no less marked a love of finery and festivity

than their descendants who were ruled by William of Orange. And within the limits of one generation the complaint was that the prodigality was the fault of "all sorts of people, promiscuously, without distinction of persons, of ranks or quality."

The Scottish Sumptuary Laws are twelve in number. Kames (*Statute Law of Scotland*) ranges them under three heads: (1) Those regarding apparel; (2) those regarding the table; and (3) those regarding the expenses of marriages, baptisms, and burials. The first class is much the most numerous of the three. We have nine enactments on the subject—one of which, the Act 1621, c. 25, however, applies also to banqueting.

The earliest law on the subject is the Act 1429, c. 118: By it, "It is statute that na man sall weare claitheis of silk, nor furrings of mertrickes (martin), funzies (pole-cat), purry (unknown), nor greate nor richer furring, not allanerlie knichtes and lordes of twa hundred markes at the least of zeirleie rent, and their eldest sonnes and their aires, but (without) speciall leave of the king asked and obtained. And none uther were broderie, pearle, nor bulzeone, but array them at their awin list in all uther honest arraiments, as serpes, beltes, broches, and cheinzies." Throughout all these Sumptuary Laws there is this same attempt to regulate dress and pomp according to social grade or office. The principle is an obvious one, is intelligible and workable; but it is one on which popular clamour would scarcely allow our legislators to proceed to-day, when its recognition is limited to the imposition of the income tax! It furnished, however, a ground of distinction for those early legislators in their efforts to cope with the extravagance of their times. The Act of 1457, c. 70, provides that no man within burgh who lives by merchandise, unless he be a "person constitute in dignitie, as alderman, baillie, or uther gude worthy men that ar of the counsell of the towne," and the wives of the same, shall wear clothes of silk, "nor costly scarlattes in gownes, or furringes with mertrickes." The wives and daughters of all others are to wear on their heads "short curches, with little hudes, as ar used in Flanders, England, and other cuntries." As to their "gownes," no women are to wear "mertrickes nor letteis (probably ermine), nor tailles unfitt in length nor furred under, bot on hailie-daie." Labourers and husbandmen are to

wear on work-days only grey and white, but on holidays their limit reaches to light blue, green, red, etc. So is it also in the case of their wives, who are further restricted to *couchies* (i.e. kerchiefs for the head) "of their awin making," and the price thereof is not to exceed 40 pennies the ell! No woman is to come to church or market with her face muffled or covered, "that sche be not kend." The other Acts regulating wearing apparel, which it would be too tedious to examine in detail, are 1471, c. 45; 1581, c. 113; 1621, c. 25; 1672, c. 10; 1673, c. 3; 1681, c. 12; and 1698, c. 7. They all speak to the same tendency to indulge in gaudy and rich attire, and betray to us that at heart our predecessors in this land were people of incorrigible personal vanity. Fur seems to have been an article of dress in which they much fancied themselves. The Legislature would seem in effect to have aimed at assigning certain furs to certain social grades of the people—much as fashion does in Russia to-day. Glaring colours, too, were much affected in Scotland from very early times, and their use is more than once restricted in these Sumptuary Laws. Embroidery of gold and silver lace and filigree also appear to have been great favourites, as also their counterfeits, and are specially dealt with in the Act of 1698. It forbids the wearing of any stuffs, etc., made of silver or gold thread, weir, or "philagram," or counterfeits thereof, in apparel or horse furniture, under pain of burning or destroying of the articles, and a fine of 500 merks (half to the discoverer and half to the judge); with imprisonment till they obey. There is a further prohibition against the importation of such goods, under pain of destruction of the goods, and a fine of 1000 merks (to be divided as above). There is a saving in favour of officers and soldiers of the Horse and Foot Guards as to their livery clothes, and other accoutrements; and *all* officers and soldiers are allowed to wear out their livery clothes already made, to the term of Martinmas 1699.

The love of fine clothing, according to the ideas and fashion of the times, was thus the more besetting sin of the Scots in the matter of luxury. The object of these Sumptuary Laws was, as we have said, to curb the extravagant indulgence of this propensity. That, at least, was their leading object. But it must be noted that some of them were also directed

against the use of articles of foreign preparation or manufacture, with the view of fostering and encouraging home industries. It was their foreign origin, quite as much as perhaps more than—their costliness, that led a patriotic government to prohibit the indiscriminate use within the realm of these various commodities. The Act 1581, c. 1 (King James VI.) is intituled, “Against the excesse of coastleie cleithing and transporting of wooll, quhairby the pure manufacture the better hadden in warke.” It premises the “greate standing among the king’s subjectes of the meane estaite, summing to counteraict his hie-nes and his nobilitie, in the using and wearing of coastelie cleithing of silkes of all sortes, laces (lawn), cammerage (cambric), freinzies (fringes), and garteres (stripes) of gold, silver and silk, and wollen clothe maid and brocht from uther foreyne cuntries, quhairby the prices of the same is grown to sik exorbitant dearth, is not abill to be langer sustained without the great shrewdness and inconvenient of the commounweill, howbeit God hath granted to this realme sufficient commodities for claithing the inhabitantes theirow within the selfe, gif the people were worthie employed in woorking of the same at home quhairby great numbers of pure folkes, now wandering begging, might be relieved, alsweil to the honesty as wealth of the cuntrie.” Similarly, the Act of 1621, c. 25, provides, by section 2, that the “pearling and ribbening tyme worn by” certain specified persons shall be “those persons within the kingdom of Scotland;” and, by section 6, that “servants, men or women, weare any cloathing except that that are made of cloath, fusteans, canvas, or stufes made within the countrey,” although by a subsequent section they are allowed to wear the “old clothes” of their masters or mistresses. We have a like preamble to the Act of Charles II. (1672, c. 10)—the great prejudice sustained by the kingdom “by the sumptuousness and prodigality which all sorts of persons use in their apparel, . . . considerable sums of money being unnecessarily exported out of the kingdom, and native commodities and manufactures thereof being thereby neglected, and not improven for the use and advantage of the inhabitants.” The Act of 1681 (c. 12) is intituled an “Act for encouraging Trade and Manufactures.” Its enactment

are on the consideration "that the importation of forrayn commodities (which are superfluous, or may be made within the kingdom, by encouragement given to the manufacturies thereof) had exceedingly exhausted the money of the kingdom, and hightened the exchange to forrayne places, so that in a short time the stock of money behoved to be exhausted, and the trade thereof to fail."

The question of the wisdom or futility, from the standpoint of economists, of such attempts to encourage home industries is perhaps not even yet conclusively settled. The controversy became keen and protracted long after the Sumptuary Laws had fallen into desuetude, and it will still take time to make all men of one opinion on the subject. There will, however, be less difference of judgment with regard to the merits of the converse provision in the Act of 1581: "That na maner of wooll be transported or put in schippes or boates, to be transported furth of this realme in time cumming, under the paine of confiscation of the same wooll, and of all the remanent gudes movabil of the persones, awners, and transporters thereof."

The Acts which bear on "the table" are three in number: 1551, c. 25; 1581, c. 114; and 1621, c. 25. The first of these, passed in the reign of Queen Mary, bears the title, "Anent the ordouring of everie mannis house." Here we have the same recognition of social grades and distinctions, which would be considered rank heresy in modern times, and an insult to the sovereign people; and on that recognition the regulations proceed. By the Act, "It is statute and ordained that the Acte and ordinance maid before Councel anentis the eschewing of dearth, and the ordouring of everie mannis house in his courses and dishes of meate, be observed and keiped in all poyntes. . . of whilk the tenour follows: . . . It is devised and ordained that na arch-bishops, bishops, nor earles, have at his meat bot eight dishes of meate; nor na abbot, lorde, priour, nor deane, have at his meat bot sex dishes of meate; nor na barronne, nor free-halder, have bot foure dishes of meate at his messe; nor na burges nor uther substantialis man, spiritual nor temporal, sall have at his meate bot three dishes and bot ane kind of meate in everie dishe."

The Act of the following reign "against superfluous ban-

quetting and the inordinat use of confectoures and drogges," shows that its predecessor of thirty years before must have had little effect in checking the so-called abuses against which it was directed. The reason for this second Act is set forth as "the great excesse and superfluitie used in bridelles and utheris banquettes amangis the meane subjectes of this realme, alsweil within burgh as to landward, to the inordinat consumption, not onlie of sik stuff as growes within the realme, but alswa of drogges,"—i.e. not medicines, but confections—"confectoures and spicerie brocht from the pairtes bezond sea and sauld at deare prices to monie folks that are verie unabil to sustein that coaste." For the "stanching of which abuse and disorder," it ordains that no one below a specified social position "shall presume to have at their bridelles or uther banquettes, or at their tables in dayly chere, onie drogges or confectoures brocht from the pairtes bezond sea, and that na banquettes sall be at onie upsittings after baptizing of bairnes in time cumming." The remaining Act bearing on the matter of extravagance in food is that of 1621, c. 25, to which we have already referred in connection with apparel. The 17th section forbids the use of "any manner of desert of wette and dry confections at banquettings, marriages, baptismentis, or any meales, except the fruites growing in Scotland: as also figs, raisins, plumbe-damies (prunes), almondes, and other confected fruites," except in the entertainment of His Majesty, and of ambassadors or "strangers of great qualitie." Feasting at burials, "or offer of other meats except bread and drinke," and the "use of any eating or drinking at night-wakings or lyke-wakes," are prohibited by section 18 of the same Act.

Under the last head in Kames' classification, we find only one statute. This is the Act of 1681 (c. 14) "for restraining the exorbitant expence of marriages, baptismentis, and burials." To our ideas nowadays its restrictions seem not only oppressive, but ludicrous as well. It ordains that marriages, baptismentis, and burials "shall be solemnized and gone about in sober and decent manner." The attendance at marriages is limited to "the married persons, their parents, children, brothers and sisters, and the family wherein they live," and not "above four friends on either side with their ordinary

domestick servants." Bride, bridegroom, parents, and relations are prohibited from making "above two changes of apparel" on the occasion! Similarly at baptisms only the parents, children, brothers and sisters, and those of the family, and not above four witnesses, are permitted to be present. As to burials, the number of those to be invited is also strictly limited, but this in proportion to the rank of the deceased. There is a further prohibition against the using or carrying of "pencils, banners, and other honours at burials, except only the eight branches to be upon the pale," or upon the coffin where there is no pale, and "no mourning cloaks" are to be used.

Bell, in his *Dictionary*, remarks of the Sumptuary Laws that "they betray an ignorance of the spirit of society." If this be true of these laws as a whole, it is peculiarly true of the provision which we find in one of them—that in section 13 of the Act 1621, sec. 25. It is hard for us now to realise that our Legislature in the reign of King James VI.—after Shakespeare had written his plays—should have gravely enacted "that the fashion of cloathes now presently used be not changed by men or women, and the wearers thereof, under pain of forfaultrie of the cloathes, and one hundred pounds to be paid by the wearer, and as much by the maker, of the said cloathes"! Canute forbidding the tide to flow is no more absurd a historical parallel than this. Fashion papers are legion with us, and huge numbers of the community depend for their means of livelihood on the *change* of fashion alone. We are accustomed to see it vary like the weather; to be quite as changeable and capricious; and we accept the phenomenon as we do many other irresistible forces in society. But the wise King James did not so. Perhaps in his didactic way he was only trying to rival Canute, and to reprove his courtiers too. If so, the ill-observance of his law did as much for him as the sea did for the earlier monarch, but he unfortunately left his irony unexplained, and failed of his purpose. It is small wonder that the learned Sheriff Barclay laconically alludes to these Sumptuary Laws as "at once impolitic and impracticable."

J. C.

THE FATE OF THE POSTPONED FIAR

A WAIL FROM WINDYWA'S.

My mither deed in 'seeventy-fowre,
 When I was turn'd o' fifty;
 An' ere anither year was owre
 My faither mairried Jean Kilgour,
 A lassie snod an' thrifty.

My faither he was seeventy-three,
 An' Jean was ane-an'-twenty:
 The lass was far owre young for me,
 Tho' whyles the corner o' her e'e
 Cam' my way kind o' squinty.

Noo ye maun ken that Windywa's
 Was oors for mony a cent'ry;
 An' sae the wily lass had cause
 To mairry hiz, an' live in braws
 Amang the hillside gentry.

A'e Sawbbath, sittin' i' the laft,
 An' thinkin' hard anent her,
 I gat a shock near drave me daft:
 Jean an' my faither—warp an' waft!—
 Were cried by oor precentor!

Of coorse, 'twas needless to rebel—
 Guidsakes! hoo could I mend it?—
 When aff a stack my faither fell,
 An' quicker than it taks to tell,
 His tack on earth was endit!

Syne in my lug anither flee
 Gaed bummin' ere I kent it:
 O' Windywa's I gat the fee—
 The will said that as plain's culd be—
 But Jean was to liferent it.

It's full-oot saxteen years sin' syne,
 An' Jean's as young as ever;
 She busks sae braw an' fares sae fine,
 I doobt the rigs 'll ne'er be mine—
 I'll no' be langest liver.

The jaud gangs jauntin' roond the hills—
 I sit an' hoosle* Taddy;
 Her lichtsome lauch it's like to kill's,—
 She says she'll get a faither till's,
 To cheer her orphan laddie!

Noo, ony man wi' half an e'e
 Can see hoo just my moan is;
 As lang as Jean's no' like to dee,
 The deil a guid I've in my fee
 Or *spes successionis*.

Gin I had Lawyer Tamson here,
 Wha drew the senseless will,
 This kittle question I wuld speir—
 What signifies a man's a fiar
 O' land he ne'er can till?

Nae houp ha'e I that I'll survive:
 My life's begoud to dwin'le;
 My only joy's to keep alive
 An' ban the law, an' them that thrive
 Thro' sic a damisht swin'le!

J. L. R.

Obituary.

MR. ANDREW JOHN DICKSON, Solicitor before the Supreme Courts (1852), died on 15th May, at the age of sixty-eight.

MR. JAMES LOW, Writer in Glasgow, died on 5th May, in his sixty-third year.

MR. WILLIAM BYERS, Solicitor, Montrose, died on 1 May.

MR. WILLIAM EDWARDS, Solicitor, died in Edinburgh 16th May, at the age of forty-eight.

MR. PATRICK COOPER, Advocate, Aberdeen, died on May, in his sixty-ninth year.

The Month.

A baronetcy has been conferred upon Sir James Steph

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Acceleration of Business.—At Glasgow Circuit Court 7th May, Lord Young, presiding in the Old Court, disposed of four murder cases before lunch! In one the sentence of penal servitude for life.

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The Procurator of the Church of Scotland.—Mr. J. Ch Advocate (1865), Sheriff of Renfrew and Bute, and Chairman of the Boundary Commissioners under the Local Government (Scotland) Act, has been appointed Procurator of the Church of Scotland. The days of *pluralities* are not over.

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Seamen's Wills.—The Irish Law Reports for April contain an instance of the privileges accorded by a liberal interpretation of the Wills Act to seamen being at sea. In *Goods of William Masters Rae* (27 L. Rep. Irish 116) a deceased, who was a staff-surgeon in the Navy, wrote a will on board ship, just before sailing, in which he stated that he ought to have made his will before sailing, and wished to leave £500 to B on trust for the children. He also requested his correspondent to act as executor if he were to die. It was held that the letter was entitled to probate. The decision of the cases on 1 Vict. c. 26, sec. 11, seems to be that

one in the service is included under the term "seamen;" and that a man in harbour, or on active service in a foreign river, is deemed to be at "sea."—*Law Times*.



Additional Chancery Judge in England.—In the House of Commons, on 27th April, Mr. Kimber asked the First Lord of the Treasury when he expected to be able to announce the conclusions of the Government as to the appointment of an additional judge or judges, or as to what other means they would take to obviate the grievous delays, and consequent losses and anxieties, in obtaining justice to which suitors were exposed. In reply, Mr. Smith said, "It is no doubt a very general opinion, in which the Government are disposed to concur, that an additional judge is required in the Chancery Division; but I am not prepared to say at what time the state of public business will enable the Government to submit a motion on the subject. Meanwhile efforts are being made to diminish the pressure of causes by the assistance of judges of the Queen's Bench Division, where the lists are in a satisfactory condition."



Divorce Law.—Mr. Hunter has drafted a Bill to assimilate the divorce law in England to that which has been in force in Scotland since the time of the Reformation. He proposes to make desertion a ground for divorce, and to give the wife a title to apply for a divorce on the ground of adultery alone.



Slander of Women.—Mr. Milvain's Slander of Women Bill has passed a second reading, and is practically sure to become law before the close of the session, as it passed a second reading last year without any opposition. It is very short, simply providing that words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable, thus reversing the law as laid down by Holt, C.J., in *Ogden v.*

Turner, 2 Salk. 696 (on the ground that this is a spiritual defamation, punishable in a spiritual Court), and denounced as unsatisfactory and barbarous by Lord Campbell and Lord Brougham respectively in *Lynch v. Knight*, 9 H. L. C., at pp. 593, 594 (see also *per* Cockburn, C.J., and Crompton, J., and Blackburn, J., in *Roberts v. Roberts*, 33 Law J., Rep. Q. B., 249). In Scotland it appears, and also throughout the United States (see "Odgers on Libel and Slander," 2nd ed. p. 88), the law is already what the Bill would make it here, while "even to charge a woman with being drunk is actionable in Massachusetts" (Odgers, *ibid.* citing *Brown v. Nickerson*, 1 Gray, 1). That our present English law has been so long the subject of unfavourable comment from the Bench without amendment is very remarkable.—*Law Journal*.



The Rights of the Unborn.—The law reports from the sister isle may not furnish English lawyers with cases to be cited as binding precedents, but still they sometimes offer to us suggestions for wide legal speculations. For instance, can an unborn child suffer an injury, for which, when he is born, he can maintain an action? That sounds an odd question to persons living on the less imaginative side of St. George's Channel. But a case in which a claim to this right was made has recently been decided in Ireland. The facts upon which the action of *Mabel Walker v. Great Northern Railway Company of Ireland* (28 L. Rep. Ir. 69) was brought are shortly as follows:—The plaintiff's mother, Mrs. Walker, being "quick with child, namely, with the plaintiff, to whom she subsequently gave birth," on a particular day was travelling on the defendants' railway. Owing to some negligence on the part of the railway officials, she met with an accident, for which she brought an action and was "settled with." Not content with this, an action was brought in the plaintiff's name, claiming £1000 damages for the permanent injury which she had suffered in the accident before she was born. On behalf of the defendants, it was argued that the railway company had only contracted to carry the mother, and had never invited or consented to receive the plaintiff on their railway, and therefore were not liable to her. On the other

hand, it was urged for the plaintiff that she was in the train, lawfully and without fraud, and therefore a duty was cast upon the company of carrying her safely. Needless to say, there was a learned discussion as to whether the child could be said to be *in rerum naturâ* before she was born. Beyond all question, for many purposes, a child *en ventre sa mère* is considered as being alive, though the dictum in Bacon's Abridgment (7th ed. vol. iv. p. 342), that "it is now clearly settled that a child *en ventre sa mère* is a life in being to all intents—except in the case of a descent at common law," may seem too wide. At all events, the learned judges of the Irish Queen's Bench Division held that the statement of claim disclosed no cause of action. Had the decision been the other way, we could not but agree with Mr. Justice O'Brien: "On what a boundless sea of speculation in evidence this new idea would launch. What a field would be open to extravagance of testimony—already great enough—if Science could carry her lamp, not over certain in its light where people have their eyes, into the unseen laboratory of nature—could profess to reveal the causes and things that are hidden there; could trace a hare-lip to nervous shock, or a bunch of grapes on the face to fright; could, in fact, make *lusus naturæ* the same thing as *lusus scientiæ*." The same judge, in a truly Hibernian vein of humour, having said that railway liability is a branch of the general law of carriers, proceeded to show how surprised the carrier would have been to hear that while he was paid for carrying one, he was in reality carrying two, or possibly three (as there might have been twins), and concluded his judgment by this sentence: "In law, in reason, in the common language of mankind, in the dispensations of nature, in the bond of physical union, and the instinct of duty and solicitude, on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company." As to the privileges which a child on its birth may immediately enjoy, the most exalted rank gives an instance in the case of the infant born King of Spain. It would require an exercise of mediæval casuistry to discuss the question whether he was a reigning sovereign before he was born, to whom his subjects could be guilty of treason. It would seem that the law

judges in each case as to the recognition or non-recognition of the existence of an unborn child on the individual merits of the case, as interpreted by the public convenience and common sense. It is obviously against public convenience that an unborn child should be destroyed without any liability attaching to the destroyer, and if the child be born alive and then die from the injury inflicted before his birth, the destroyer is guilty of murder (1 Hawkins' "Pleas of the Crown," 8th ed. p. 95).

The dictates of common sense have often shown that some of the old rules of property were not founded on public convenience, and to save some disastrous results the Courts have construed a child *en ventre sa mère* as already born. In the great case of *Thellusson v. Woodford* (4 Ves. 227), it was decided that the period during which property might be tied up, namely, lives in being and twenty-one years after, included the lives of persons *en ventre sa mère* at the testator's death. In other words, such persons would be considered as living at his death. This case went to the House of Lords, and was affirmed by them (11 Ves. 112). The Legislature has at least once interfered on behalf of such infants, having passed an Act to enable posthumous children to take estates, as if born in their father's lifetime. That Act, after a preamble reciting that "it often happens that, by marriage and other settlements, estates are limited in remainder to the use of the sons and daughters, the issue of such marriage, with remainders over, without limiting an estate to trustees to preserve the contingent remainders limited to such sons and daughters, by which means such sons and daughters, if they happen to be born after the decease of their father, are in danger to be defeated of their remainder by the next in remainder after them, and left unprovided for by such settlements, contrary to the intent of the parties that made those settlements," enacted that such children shall take the estates as if they had been born before their father's death. Other cases in which such children are treated as being born will be found referred to in the Irish case which we have been considering; but we must guard ourselves against being supposed to say, that in all cases where it is for the infant's benefit he will be regarded as already born, since it would have been clearly for

his benefit to have obtained the damages claimed on his behalf on account of the accident by which he was born a cripple.—*Law Times*.

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Sensational Trials.—Mankind will study mankind to the end of time, and those whose lives are lived within limits will feel the interest of astonishment or horror or curiosity as to the lives of those who in any way—usually it is a frightfully bad way, but not quite always—have stepped or rushed or fallen outside the lines. Think how you breathe when a window-cleaner steps fairly to the edge of the sill forty feet in the air, and remember that that is the mental position of the millions when any one they know of is on trial for his life, or his existence as a man among fellowmen. Unless something really great in the way of public events—a war, for instance—absorbs all public attention upon itself, the appetite for stories told in courts of justice will not die out or even greatly diminish. They were the enjoyment of the Athenian slave-owners—perhaps the most intellectual class who ever existed—and of Roman plebeians, and whatever survives for centuries dies too slowly for any one generation to expect in its own time a visible and notable decline.

We say this without in the least receding from our old position, that the appetite for sensational trials is in itself a bad sign, and its indulgence almost invariably attended with deterioration. The last generation, which habitually exaggerated the impact produced by every recurring thing, from church-going to the reading of broadsheets, just as we now exaggerate the results of methods of education, and the effects of want and comfort, may have exaggerated in some respects the consequences of sensational literature. As Mr. Spencer tried to explain to the House of Commons committee, which sat respectful but incredulous, men are very savage still, and it is probable that the cultivated overrate the impression, whether good or bad, produced by all literature whatever. It takes a hard blow to bruise a rhinoceros, and the effects produced by hundreds of thousands of sermons is so slight that there is reason to hope that the consequences of years of sensational reporting may be slight also. The devotees of

respectability are an immense majority, and their views of things do not change much, for all the blizzards of evening papers which occasionally disturb the surface of the world. Still there are two evil consequences about this appetite for sensational trials about which there can be no dispute, although one of the two may prove to be only temporary. They increase the cleavages of society. Owing mainly to our system of reporting, which is healthily reticent whenever poor men are exclusively concerned,—the very worst English trial of our time never obtained one line in a London paper,—the trials which are fully detailed are nearly always those of the cultivated, to the increase of the entirely unfounded theory that the cultivated are exceptionally corrupt, and to the creation of a most regrettable impediment in the way of their moral leadership. The uncultured lose reverence for the cultured, and with it half the advantage they might derive from their existence. This phase of feeling will probably pass with the spread of knowledge, as it has passed in Germany and Scotland; but the injury done by the other evil, the habitual dissipation of the mind, must be more lasting. The public is perpetually swallowing mental absinthe till it loses all relish for healthy diet. It will scarcely read anything so dry as political thinking, and for independent reflection it leaves itself no time. Already it demands that its mental bread shall be cut into minute squares, so that it may be swallowed, as pills are, without mastication or effort, and presently it will refuse bread altogether, as young men and women do who have indulged for years in a course of exciting novelettes. That is an immense evil, threatening the whole progress of the new generation; and we confess we see no remedy for it, any more than we do for the sale of shilling shockers and penny dreadfuls. It is a mischief of the times, produced by the rushing advance in the means of disseminating knowledge of which some of us are so proud; but though at present incurable, the mischief may at least be acknowledged.—*Spectator*.



Disturbance of Worship.—North Carolina is a famous State for complaints of disturbance of religious worship, and of

nuisance caused by singing. Two very recent cases reiterate this sensitiveness. In *State v. Kirby* the jury specially found that defendant engaged in a fight near a church during public worship; that some one announced that fact in the church, whereupon the congregation ran out; and that the congregation, while in the church, could not hear the fight. *Held*, that defendant was not guilty of disturbing public worship. In *State v. Roseman* it was held that a fine of \$100 is not excessive, where it appears that the prisoner having refused to stop her singing, which greatly annoyed the sick wife of the jailor, he severely and cruelly beat her with a horsewhip. We would counsel the Wagner operatic companies not to go to North Carolina.—*Albany Law Journal*.



Lynch Law.—Mr. Justice Harrison, one of Her Majesty's judges in Ireland, recently declared on the bench at the Galway Assizes that he wondered why the people did not resort to Lynch law to put a stop to infringements of public peace. Mr. Dillon brought the words of the magistrate before the House of Commons, where they created some sensation. In the debate which followed, reference was made rather satirically to "American methods of justice," which were not desired under the "saner and more conservative institutions of the United Kingdom." The incident and debate have brought out the well-authenticated fact that Lynch law did not originate in the United States, but in the United Kingdom, and oddly enough, in Galway; and still more oddly, that its modern significance is not precisely what it originally meant.

It is true that Webster's dictionary attributes its origin to the peculiar method of a Virginia farmer named Lynch, who was accustomed to dispensing with legal forms when administering what he supposed was justice with a whip on the bare backs of persons who interfered with his rights.

It is also incorrectly noted in Reddall's *Fact, Fancy, and Fable*, and in Edwards' *Words, Facts, and Phrases*. In the *Dictionary of Phrase and Fable* it is doubly ascribed to the true source and to the false Virginian source.

It is correctly given in the *Topographical Dictionary of*

Ireland, by Lewis, printed in London in 1837. James Lynch Fitzstephen was warder in 1493 of the town of Galway, which had a considerable commerce with French and Spanish ports. His son had a friend, a Spaniard, whom he believed to have alienated the affections of his betrothed wife, and young Fitzstephen, or Lynch, as the family name ran, killed him at sea. Lynch was condemned to death, and sentenced by his father, upon whom the cruel duty fell on account of his office. The people sympathised with the son, and perhaps with what they believed to be the real feeling of the father, and prepared to prevent the execution. The executioner refused to do his work. The father resolved that the law should be obeyed, hanged the condemned boy with his own hands out of the window of his house.

In 1624 a monument of this episode, comprising a skull and cross-bones carved on black marble, was erected, and is now on the wall of St. Nicholas Churchyard.

It was the mob, therefore, and not James Lynch who proposed to break the law or suspend its usages and force; but the caprice of time has transferred the epithet to lawless deeds. The coincidence acquires further interest from the fact that it is also from Ireland the English language has derived another word descriptive of passive abrogation of law—boycott. The methods and objects implied in both words, however, are as old as civilisation. It is only the descriptive appellatives that are modern.—*Chicago Herald*.



Outside Pressure on Parliament.—The petition from the Legislature of Newfoundland to be heard through their delegates against the Newfoundland Fisheries Bill at the Bar of the House of Lords, supplies a fitting opportunity for summarising the chief conditions under which direct pressure from without may be brought to bear on either House of Parliament. Lord Dunraven, who moved the petition praying a hearing for the Newfoundland delegates, grounded his motion on grounds which do not seem to us to have a bearing on the question viewed in its constitutional aspect. He cited several cases in which representatives of colonies had been heard at the Bar, such as the case of Lower Canada in 1838,

that of Jamaica in the following year, and the previous case of this very colony of Newfoundland in 1842. His lordship then laid stress on the fact that in none of the instances cited were the circumstances so strong as in the present petition, since all the colonies where delegates had in former times been heard at the Bar "were more or less directly administered by the Colonial Office, and were more or less under the control of the Government," whereas "a colony of the status of Newfoundland" had a superior position in asking this privilege, being in full enjoyment of responsible government.

But, with all respect to Lord Dunraven, the privilege of being heard at Bar, either personally or by delegation or by counsel, does not depend either on the dignity or the lowly estate of the petitioner. It depends on the question as to whether the House is of opinion that the public Bill before it is of so peculiar a character as to justify the hearing of parties whose interests, as distinct from the general public interests, are directly affected by that Bill. This doctrine was very clearly laid down by Lord Brougham in the debate on the Australian Colonies Government Bill in the Lords on the 10th June 1850, and has been since regarded as unexceptionable. It was only because the Legislature of Newfoundland came distinctly within the category of a body whose especial interests were affected by the contemplated legislation that the prayer of its petition to be heard at Bar was granted. Had the petitioners failed to come well under this heading, we have no doubt that the Government would have opposed their petition for a hearing, pointing out that it is a general principle of legislation that a public Bill, being of national interest, should be debated in Parliament on grounds of public expediency, and that the arguments on either side should be restricted to members of the House. If the Newfoundland Fisheries Bill came before either House as a question of public policy alone, its discussion would have been confined to members; it was because protection was sought for rights and interests especially affected by that Bill that the delegates as representing these rights and interests were heard.

Closely connected with the privilege of being heard at the Bar is the right of presenting petitions to either House.

This right has existed from the earliest times, and is one of the rights of the subject specially guaranteed by the Bill of Rights. It had, however, been restricted for many centuries—as the privilege of being heard at the Bar is now restricted—to petitions for the redress of grievances specially affecting persons or localities. The free use of petitions was not extended to public matters by the Revolution. The fate of the Kentish petition in 1701 proves how little disposed the Parliament of that time was to tolerate petitions of a general political character. The great multiplication of petitions wholly unconnected with particular interests is traced by Sir Erskine May to the year 1779 as a result of the agitation for political and economical reform, and by Mr. Hallam to the year 1787 as the result of the agitation for the abolition of the slave trade.

The principles which regulate the granting of the favour of a hearing at Bar are identical in both Houses, as also are the rules governing the receiving of petitions. In the Lords, however, the arguments of the petitioners can be repeated and enforced by debate. In the Commons this privilege no longer exists. After the Reform Act the debating of petitions threatened to absorb the whole time of the House. For the two sessions 1833 and 1834, morning sittings from twelve to three were devoted to petitions, but were found to be insufficient. All debate upon presentation of petitions in the House of Commons was at length in 1839 prohibited, although a special provision allows petitions "complaining of some special grievance" to be discussed on presentation. Lord Brougham often regretted this curtailment of the privilege of debate on petitions—a privilege to which the first discussions in Parliament on every project of reform was due. We are consoled for the loss by the reflection that the aim of successive Reform Acts has been to bring the House of Commons into harmony with the wishes of the people.—*Law Times*.



Can a Murderer acquire a Title by his Crime?—A decision which brings about a just result, but upon wrong grounds, is commonly mischievous as a precedent. A pertinent illus-

tration of such mischief is to be found in *Shellenberger v. Ransom* (Nebraska, 1891), 47 N. W. R. 700, in which case *Riggs v. Palmer*, 115 N. Y. 506, was treated as a controlling authority. In the New York case a young man murdered his grandfather in order to prevent a revocation of the latter's will, in which he, the grandson, was the principal beneficiary. Being convicted of the crime, and sentenced to imprisonment for a term of years, he still claimed the property as devisee. The majority of the Court, however, decided in favour of the testator's heirs, treating the will as revoked by the crime of the devisee. Two judges, dissenting, were of opinion that the will was not revoked, and that the grandson should keep the property in spite of his crime.

It seems possible to agree with the dissenting judges, that there was no revocation of the will, and also to agree with the majority of the Court, that the grandson could not retain the property. By a familiar equitable principle, one who acquires a title by fraud or other unconscionable conduct is not allowed to keep it for himself, but is treated as a constructive trustee for the benefit of the victim of his fraud, or, if he be dead, for his representatives. Accordingly, full effect might have been given to the will, and yet the devisee, as a constructive trustee, might have been compelled to surrender his ill-gotten title to the testator's heirs. In cases like *Riggs v. Palmer*, where the controversy is between the criminal and the representatives of his victim, the view here suggested and the view of the Court may lead to a different mode of procedure, but they accomplish the same practical result. But directly opposite results are caused in cases where the controversy is between a *bona fide* purchaser from the criminal and the representatives of his victim. If no title passes from the deceased to the murderer, his purchaser gets none, however innocent. But if the murderer gets a title, although as a constructive trustee, an innocent purchaser from him will acquire a title free from the trust. This distinction was involved in *Shellenberger v. Ransom*.

A father murdered his daughter in order to inherit her property, and, four days later, sold the property to a third person. The Court, reading into the Statute of Descent a disinheriting clause, as the majority of the Court in *Riggs v.*

Palmer had read into the Statute of Wills a revocation clause, decided that the daughter's property did not descend to the father because of his crime, and consequently declined to consider the question of the purchaser's good faith, although this should have been the cardinal point of the case. It is believed that the so-called fusion of law and equity is largely responsible for such decisions as those under discussion. The advantages of vesting a Court with both legal and equitable powers are not to be denied. But when the doctrines of equity are no longer administered in a separate Court, it is all the more important not to lose sight of the fundamental distinction between law and equity—a distinction as eternal as the difference between rights *in rem* and rights *in personam*.—*Harvard Law Review*.



The Clan Laurin.—There are few Highland clans from which the legal profession of Scotland has not received recruits at one time or another—few, accordingly, whose history is utterly destitute of interest for the readers of a law magazine. We have been so fortunate as to come across the report of a very pleasing lecture on the Clan Laurin, recently delivered before the Highland Institute, by Mr. J. Anderson MacLaren, advocate. The tone pervading Mr. MacLaren's essay is that so common in these times of high culture, viz. a dilettante, good-humoured capricism, but with the generous pride of Highland descent, nevertheless, forcing its way through the crust of culture. The lecture opens with a passage which well illustrates this:—"It has been the settled practice of every century to despise its immediate predecessor, and I have no doubt if we had taken the trouble to go groping about the second century of the Christian era, that we would find evidences of a somewhat *blasé* criticism of the first, coupled with hints of a complacent Chauvinism of its own. The eighteenth century has been well abused by our own; but now with the sable locks turning to the grey, and with almost one foot in the grave, the nineteenth is relenting. Its own lusty prime is past, and it is more apt to live and let live. We are upon the eve of being ourselves placed under the microscope. The eighteenth century is forgiven; the others were forgiven long

ago. Nowadays they are held up to worship, and we are feasted with the *fin de siècle* curiosity of an aristocratic itch to be identified in some way with the past. Who will again speak of Radical Scotland with the sight of a good score of Highland clan societies in his mind? The lines of Lord John Manners, now the Duke of Rutland, seem to hit the spirit of the hour: 'Let science, art, and learning all decay, but leave us still our old nobility.' Our old nobility was our clans. We are doing the best to keep them with us, and we are succeeding in the best sense. We ought to succeed were it only for one thing—to tear from the heart of affectation that prudery which flies to cover the nakedness of a piano's legs with ornamental frills, or which blushes at the suggestion that Venus may possibly be visible to the naked eye. That, however, might be a poor justification, but each of you carries the justification better than I can or will attempt to describe. Another and a more worthy pen is left to do that justice." The Clan Laurin's contributions to Scots Law were dealt with towards the close of the lecture. After a reference to John MacLaurin, a Senator of the College of Justice, under the title of Lord Dreghorn in 1787,—“Eminent in his day as a lawyer, and the author of legal works in other branches of literature,”—Mr. MacLaren said: “To come to more recent times, we have the well-known name of Duncan MacLaren, the late member of Parliament for Edinburgh. His name must be too well known to you all to require any commendation from me. His son John, now Lord MacLaren, was Lord Advocate for Scotland, and then assumed the judicial robes, where (*sic*) he now sits in the First Division of the Court of Session, almost our only authority upon the law of trusts and trust settlement. Modesty forbids me to go further.”

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First Offenders.—By the Probation of First Offenders Act 1887 (50 and 51 Vict. c. 25), magistrates received power to release on probation persons convicted of larceny, false pretences, or any other offence punishable with not more than two years' imprisonment, where no previous conviction is proved, if it appears to the bench, on account of youth, character, and antecedents, or the trivial nature of the offence,

to be expedient to do so. The offender is to enter into recognisances, with or without sureties, to come up for judgment if called on within a specified time. A return has just been laid before Parliament, showing the number of cases in which persons have been released under the provisions of this Act in the metropolitan police district, the West Riding of Yorkshire, Lancashire, Staffordshire, Warwickshire, and Durham—the most densely populated parts of England—during 1888, 1889, and 1890, and also the number of cases in which persons have been called upon to appear and receive judgment, or are known to have been subsequently convicted of a fresh offence. The figures seem to show that the statute has worked efficaciously. Out of 614 persons released on probation in 1888, 36 have either been called up for judgment through failure to observe the condition of their recognisances or have been subsequently convicted; out of 924 released in 1889, 69; and out of 992 in 1890, 64 were recalled or convicted a second time. These figures, however, do not represent altogether the application of the principle of the Act by magistrates. In some very important courts, including three in London, the provisions of sec. 16 of the Summary Jurisdiction Act 1879 are used instead, and the same end thus secured, while in other courts long adjournments, without proceeding to conviction, are employed, or cautions and nominal punishments are administered.—*Law Times*.



Gaming on Licensed Premises.—Raids on gaming-houses are, it seems, becoming very common just now, and, in connection with the police-watching of certain Buckinghamshire public-houses, Mr. Matthews has stated in the House of Commons that in London the practice of the police authorities was to give warning before taking action, but that this was not the case in the country. The Licensing Act, 1872, sec. 17, which imposes a penalty on a licensed person who “suffers any gaming to be carried on in his premises,” and directs that a conviction for this offence “shall, unless the convicting magistrate otherwise direct, be recorded on the licence of the person convicted,” is, of course, silent as to any

previous warning. The current of the decisions (see *Bosley v. Davies*, 45 Law J. Rep. M. C. 27; *Redgate v. Haynes*, 45 Law J. Rep. M. C. 65; and *Bond v. Evans*, 57 Law J. Rep. M. C. 105) is strong against the liability of licensed persons for their servants in this matter. Only in *Somerset v. Hart*, 53 Law J. Rep. M. C. 77, where the potman, not proved to be in charge, saw some gambling, and did nothing to prevent it, and the master was in another part of the building and knew nothing about it, has a "licensed person" succeeded in persuading the High Court that he ought not to be convicted.—*Law Journal*.



The Stamp Duties Bill.—The object of this Bill is stated in the memorandum prefixed to it to be "to consolidate the several enactments relating to the stamp duties payable upon instruments." These enactments are at present contained in the Stamp Act, 1870 (33 & 34 Vict. c. 97) and the multifarious amendments of particular parts of it by successive Acts. The Act of 1870, which was itself a consolidating measure of great general importance, is, with the exception of the comparatively insignificant 34 & 35 Vict. c. 4 (relating to foreign securities, stock, mortgages, and proxy papers), 37 & 38 Vict. c. 19 (relating to duty payable by Scotch advocates and Irish barristers), 37 & 38 Vict. c. 26 (relating to Canadian Stock), and 39 & 40 Vict. c. 6 (relating to sea policies), the only existing Act which deals with stamp duties alone. The numerous other statutory provisions as to stamps are contained in various Customs and Inland Revenue Acts, Inland Revenue Acts, and a certain "Revenue, Friendly Societies, and National Debt Act," 1882 (45 & 46 Vict. c. 72). These Acts, of which one at least has been passed annually since 1870, sometimes do and sometimes do not contain amendments of stamp law. When they do, the stamp amendments are placed in a separate "part" by themselves. But in order to be sure of the stamp law on any particular point it is absolutely necessary to at least glance at every one of these annual Acts. Considering that a solicitor, getting his client into a difficulty by not stamping a document or by stamping it insufficiently, would, beyond doubt, be liable to

an action for negligence, we have no hesitation in saying that the present Bill will effect a most beneficial improvement in the law, and we have no doubt that it will receive the cordial support of all the law societies in the kingdom.

Let us now call attention to such points of detail as seem to require further consideration. First and foremost, we observe that the Act of 1870 is not to be entirely repealed. In the third column, headed "Extent of repeal of the third schedule"—which schedule contains "enactments repealed"—we read, in relation to the Act of 1870: "*Except sec. 25 so far as it relates to provision (3) and secs. 27 and 28.*" Turning to the enactments thus saved, we find that sec. 25, sub-sec. 3, provides a penalty for practising "any fraudulent act, contrivance, or device not specially provided for, with intent to defraud Her Majesty of any duty," that sec. 27 prescribes the mode of making declarations for the purpose of the Act, and that sec. 28 provides that any person who receives any sum of money on account of duty, and does not "appropriate such money to the due payment of such duty," is to be accountable for such duty, and made to pay the same by means of proceedings to be instituted in the long-since abolished "Court of Exchequer." The astute persons who preside at the Board of Inland Revenue must, we imagine, have had some reason for these peculiar savings. For ourselves we have failed to discover any. If, however, the exact language of the enactments saved is so sacred that the Board cannot find it in their hearts to repeal and re-enact it in phraseology adapted to the Bill and to the merger of the Court of Exchequer in the High Court of Justice, we would suggest that the enactments should be tacked on to the Bill by means of a fourth schedule. Precedents for such a course may be found in the schedule to the County Electors Act, 1888, and the second and third schedules to the Housing of the Working Classes Act, 1890.

The second paragraph of clause 2, which contains the substantive enactment taken from sec. 23 of the Act of 1870, that, "except where express provision is made to the contrary, all stamp duties are to be denoted by impressed stamps only," ought surely to form, as in the Act of 1870, a section by itself in point of form. In point of substance, we doubt whether

the exceptions ought not to be increased. For instance, in clause 78, adhesive stamps are to be allowed as duties on leases of houses for a definite term, not exceeding a year, at a rent not exceeding the rate of £10 a year. Why should not this exception be very widely extended, to include at any rate all tenancies from year to year?

Clause 14, which deals with the all-important subject of the terms on which instruments not duly stamped may be received in evidence, contains a curious piece of obscurity. By sec. 16 of the Act of 1870, as amended by sec. 44 of the Customs and Inland Revenue Act, 1881, for which this clause is proposed to be substituted, it is the duty of the officer whose duty it is to read any instrument produced in court to call the attention of the judge "to any omission or insufficiency of the stamp thereon," and it is provided (this was the amendment effected by the Act of 1881) that in case of an arbitration it is the duty of the arbitrator to act as if he were the officer of a court. Clause 14 merely provides that, on the production of an instrument in any court or before any arbitrator or referee, the officer whose duty it is to read the instrument shall call the attention of the judge, arbitrator, or referee to any omission or insufficiency of the stamp, etc. These words appear at first sight to relieve arbitrators in many cases of a tiresome duty. They presuppose an officer in attendance upon him, and throw upon that officer the duty of looking to stamp questions. But, as a matter of fact, there is no such officer. Who, then, is to discharge the duty thrown upon an arbitrator by the Act of 1881? Is the arbitrator to be "two gentlemen rolled into one," and as such to call his own attention to these questions? If this be intended, it ought to be more clearly expressed.

Another point deserving of attention is whether an instrument should still be required, as by sub-sec. 4 of clause 14, re-enacting part of sec. 17 of the Act of 1870, to be stamped in accordance *with the law in force at the time when it was first executed*. This was not the law before the Act of 1870 (see *Buckworth v. Simpson*, 1 C. M. & R. 834; *Deakin v. Pennel*, 2 Ex. 320). In order to comply with it, much tedious hunting through repealed Acts is necessary. We think it an unnecessarily harsh provision, and hope that

it may be modified so as to bring the law more in accordance with convenience, though we confess ourselves unable to suggest an amendment which may absolutely secure the Revenue from loss.

In connection with clause 33, which defines "promissory note," we observe that the definition is different from that contained in sec. 83 of the Bills of Exchange Act, 1882, and would suggest that the latter definition should be incorporated in the Bill, and form an exhaustive definition for stamp purposes. Clause 44, which imposes a penalty on unqualified persons "preparing any instrument relating to real and personal property, or any proceeding in law or equity," contains, as might have been expected, the same exceptions as those contained in section 60 of the Act of 1870, from which it is taken. Thus, it is to be still provided, that the word "instrument" shall not include a will, or "an agreement under hand only." To the first of these exceptions no objection could be taken. But what of "an agreement under hand only"? This is a very wide exception, including, for instance, all agreements for sale and all agreements for leases. It is suggested that, in fairness to the qualified persons who have to pay for admissions and certificates, this exception ought to be considerably restricted. Clause 102, which deals with receipt stamps, and provides for stamping after execution within fourteen days only, "with an impressed stamp," might perhaps be altered so as to run more in favour of the public; to allow, for instance, an adhesive stamp after execution, or to extend the time within which the impressed stamp may be affixed.

Whether these or any other alterations are likely to be made in the Bill we cannot say. In the case of a consolidating Bill it is not usual for a Government introducing it to accept many amendments. The best course for those interested in the Bill to pursue is to agree on a few proposals of real importance, and to combine in urging them upon the Government, but to leave minor points alone; otherwise there may be danger, looking to the period of the session we have now arrived at, of losing altogether a very valuable and useful measure.—*Law Journal*.

Reviews.

The Elements of Mercantile Law. By THOMAS EDWARD SCRUTTON, Barrister-at-Law, Lecturer in Common Law to the Incorporated Law Society.

THIS little book is not meant to enter into competition with the universally known English text-books which so completely hold the field in the various departments of the Law Merchant. It is merely a re-publication in printed form of lectures orally delivered by the author to the Incorporated Law Society, and taken down by a shorthand reporter at the time. The result is a volume which deserves to be prized by law students and men of business alike; by the former because of the luminous vivacity, as of clear-spoken discourse, which lightens the otherwise weary labour of law-reading; and by the latter because of the author's plain, straightforward statement of the leading legal rules which ultimately affect the work of every business man. It is a strong point in favour of Mr. Scrutton's little book, compared with some other published lectures on Mercantile Law, that care has been taken to purge them of that redundancy and of those breaches of the rules of grammar and syntax which deface unrevised publications of oral dissertations.

English Decisions.

APRIL—MAY.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

WILL.—*Illegitimate child described as "daughter"*—*Residuary gift to "children."*—A testator, after making various bequests, including a bequest of his business and book-debts to his "sons," in equal shares, bequeathed all the residue of his estate and effects to his executors upon trust to sell, and out of the proceeds to pay the following legacies:—viz. £500 to his "daughter" Elizabeth S., and £380 to his "son" William W., and £200 to his "daughter" Jane

B., and £200 to his "daughter" Emily L., and then to divide the residue among all my "children" in equal shares. The testator appointed his "son-in-law" James S. as one of his executors. Elizabeth S. was an illegitimate child of the testator. James S. was the husband of Elizabeth S. *Held* (by Mr. Justice North), that the will showed that the testator intended to include Elizabeth S. within the term "children," and that she was therefore entitled to a share in the residue.—*Re Wright: Whitehead v. Stares*, High Ct., Ch. Div., 9 April.

CONCURRENT WILLS.—*Domiciled Scotchman—Property in England*.—The testator, a domiciled Scotchman, died, leaving two concurrent wills, executed on one and the same day. The one dealt exclusively with property in England, and appointed executors resident in England. The Scotch document dealt exclusively with property, real and personal, in Scotland, but directed that all debts of the deceased were to be charged exclusively out of the estate situate in Scotland and passing to the Scotch executors and trustees. Three executors named in the English will were, with three other gentlemen, appointed as trustees of the Scotch will. The estate of the testator was said to amount to some £500,000 in Scotland and £100,000 in England. The three English executors now moved the Court to decree probate to them of the English will without incorporating in such probate the Scotch will. This latter was in the form known as a deed of mortification, and was stated to be 130 folios in length. Mr. Justice Jeune, while considering that the question of expense was not important, looking to the amount of the property in both countries, and while intimating that the charging of the debts exclusively upon the Scotch property distinguished this case from the facts in the case of *In the Goods of Astor* (1 P. Div. 150), granted the application, upon the ground that, as the debts amounted in all to only some £400, no one could be prejudiced, either in England or in Scotland, looking to the enormous preponderance of assets over liabilities in either country.—*In the Goods of Fraser*, High Ct., P. & D. Div., 14 April.

SHIP.—*Charter-party—General average—Arbitration*.—An action was brought by charterers of the *Persian Prince*, a steamship belonging to the defendants, claiming a general average contribution, which they alleged was due in respect of a general average loss which occurred in the river Parana, where the said steamship stranded, while on a voyage under the said charter-party. The defendants applied, under the Arbitration Act 1889 (52 & 53 Vict. c. 49), sec. 4, which gives the Court power to stay proceedings where there is a submission that the proceedings in the action should be stayed, on the ground that the parties had, by a clause in the charter-party, agreed to refer all disputes to arbitration. The master made the order staying the proceedings, and this order was reversed by Mr. Justice Smith, and from his decision the defendants now appealed. *Held* (by Mr. Justice Matthew and Mr. Justice Williams), that a claim for general average was not a dispute under

the charter-party, and was not within the reference clause therein, and that the action could not be stayed.—*Walford & Co. v. The Prince Steam Shipping Company Limited*, High Ct., Q. B. Div., 15 April.

WOMAN.—*County Council—Penalty—Local Government Act 1888* (51 & 52 Vict. c. 41 sec. 75)—*Municipal Corporations Act 1882* (45 & 46 Vict. c. 50, secs. 41 and 43).—By these sections of the last-mentioned Act (incorporated into Local Government Act), a person acting in a corporate office without having made the declaration required by the Act, or without being qualified at the time of making the declaration, is liable to a fine for each offence; and every election “not called in question within twelve months after the election . . . shall be deemed to have been to all intents a good and valid election.” The defendant, a woman, was elected a County Councillor for London in January 1889, and during the twelve months following her election was not called in question. In *Beresford-Hope v. Lady Sandhurst* (23 Q. B. Div. 79) it was held by the Court of Appeal that a woman is incapable of being elected a member of a County Council. In February 1890 the defendant acted as a County Councillor, and the present action was brought for penalties on each occasion of her doing so. *Held* (by the Lord Chief-Justice, the Master of the Rolls, and Lord Justice Fry), that the defendant was liable to the penalties imposed by the Municipal Corporations Act.—*De Souza v. Cobden*, Ct. of App., 16 April.

COMPANY.—*Prospectus—Misrepresentation.*—The prospectus issued by the directors of a mining company stated that full reports as to the property of the company had been prepared for the directors by engineers, and it contained extracts from one of those reports. Plaintiff took shares. In an action for deceit against the directors for having induced plaintiff to take shares by untrue statements, there was proof that the reports had not been made on instructions by the directors, and in particular that the report quoted had been made on the instructions of the agents of the vendors to the company. *Held* (by Lords Justices Lindley, Bowen, and Kay, reversing the decision of Mr. Justice Romer), that the decision of the House of Lords in *Derry v. Peek* (14 App. Cas. 337) showed that, in order to make the defenders liable, fraud on their part must be proved; and that only gross and culpable negligence had been proved in this case, which was not sufficient.—*Angus v. Clifford*, Ct. of App., 18 April.

RESTITUTION OF CONJUGAL RIGHTS.—*Non-compliance—Petition for allowance—Anticipating income or settled property.*—This was an application by the wife, that her husband's petition for an allowance, presented under the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), be dismissed, and that he be ordered to pay the costs of and incident to the said petition, and of this application. The husband, having obtained a decree for restitution of conjugal rights, which was not complied with, presented a petition for an allowance or settle-

ment under sec. 3 of the Act of 1884, for the benefit of himself for the support of his children. The Registrar in due course reported upon this petition, and came to the conclusion that husband's income, at the time of presenting the said petition, about £85 a year, mostly derived from a pension, while that of respondent was £540 a year, this latter being entirely derived from property settled upon the marriage, with a restraint against anticipation. The husband having moved the Court, upon the Registrar's report, and asked for a settlement in the usual proportions, and the figures found by the Registrar, Mr. Justice Jeune considered that this case was entirely covered by the authority of *Swift v. Swift* and therefore made the order. The Court of Appeal subsequently decided that *Swift v. Swift* and *Michell v. Michell* were wrong in law, and that sec. 3 of the Act of 1884 confers upon the Court power to order an allowance in cases where the wife's property is settled with restraint against anticipation. The wife now moved the Court to dismiss the husband's petition for an allowance, and to order him to pay the costs. It was conceded on behalf of the husband that the petition, upon the view of the law adopted by the Court of Appeal, must now be dismissed, but it was urged that it should be without costs, there being no precedent for ordering costs in favour of a party in contempt, as the wife was here, with respect to the former decree of this Court. In the exercise of its discretion as to costs, the Court (Mr. Justice Jeune) decided to make an order, the whole of these proceedings having been brought about owing to the persistent refusal of the wife to comply with the former decree for restitution. The husband had reasonably taken the present proceedings with the view of obtaining some allowance for himself and children, and, unless the doctrine *Ignorantia neminem excusat* was to be so widely construed as to imply that a person must know the whole law, he naturally thought he would succeed, as the petitioner in *Swift v. Swift* had done. The husband would, however, have to pay the costs of this application, which was rightly made in court.—*Michell v. Michell*, High Ct., P. Div., 20 April.

CHARITY.—*Cy-près application*.—In the year 1881 funds were collected to relieve the distress occasioned by an inundation of the Thames in Southwark. After satisfying that object, a large sum remained in the hands of the rector and churchwardens of Southwark as the trustees of the fund. The present action was brought for a declaration that the fund was charitable, and that the rector and churchwardens might be at liberty to apply part of it for the repairs of the church, and the rest of it for the benefit of the poor of the parish. The Attorney-General objected to the application of the fund for purposes other than that for which it was subscribed, in the absence of evidence that it would never be required for the relief of similar distress in the future. *Held* (by Mr. Justice Stirling), that a sum of £700 should be transferred to the other trustees to provide against any possible future inundation, and that

scheme for the application of the balance should be agreed to between the parties, or, if that could not be done, by the judge at chambers. —*De Fontaine v. Attorney-General*, High Ct., Ch. Div., 21 April.

LIBEL.—*Interlocutory injunction.*—In an action of libel against the publisher of a newspaper called the *Financial Observer*, a motion was made on behalf of the plaintiffs to restrain the defendants from (*inter alia*) selling, circulating, or communicating to any person, any copy of the *Financial Observer* of the 7th February 1891, containing an article headed "The Fletcher Mills of Providence, Rhode Island," or of the article in question, or any copy of, or extract from, or any material part thereof, so far as it affected the plaintiffs. At the hearing of the motion the plaintiffs filed an affidavit categorically denying the truth of all the alleged libellous statements. The defendant filed an affidavit in answer, stating that the statements in the article were true in substance and in fact, and that he would be able to prove their truth at the trial of the action. North, J., held that the statements in the article were calculated to injure the plaintiffs in their business; that, on the evidence before him, any jury would find the libels to be untrue in three material statements; and that an injunction must be granted to restrain the defendant, until the trial of the action or further order, from publishing the article in question. *Held* (by Lord Chief-Justice, the Master of the Rolls, Lords Justices Lindley, Bowen, Fry, and Kay) that there was jurisdiction to grant an interlocutory injunction in an action of libel; that that jurisdiction should be exercised only under very special circumstances; and that (Lord Justice Kay dissenting) the circumstances of the present case were not sufficiently special to justify the granting of the injunction.—*Bonnard v. Perryman*, Ct. of App., 21 April.

OFFER.—*Reward for information leading to conviction.*—*Publication of offer.*—The defendant offered a reward of £25 to any person who should give information leading to the conviction of the perpetrator of a certain criminal assault committed on the 27th May. A placard containing the offer was, by the defendant's order, printed on the 29th May, and the same night was sent off by post to the various police stations in the neighbourhood. According to the notice, the information was to be given to Inspector Penn, who was also the officer who had charge of the distribution of the notices. The plaintiff, a police sergeant, while on duty at 2 A.M. on the 29th May, sent, by a comrade, a message to Inspector Penn, which reached him on the morning of the 30th May, and which led to the conviction of the offender. *Held* (by Mr. Justice Day and Mr. Justice Lawrance), that the publication of the offer was complete before the information of the plaintiff reached the inspector, the intermediate persons being the plaintiff's agents to transmit, not the defendant's agents to receive his message, and that verdict ought to be entered for the plaintiff for £25.—*Gibbons v. Proctor*, High Ct., Q. B. Div., 22 April.

CRUELTY TO ANIMALS.—*No evidence of guilty knowledge*—*Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), sec. 2.*—By sec. 2 of the Prevention of Cruelty to Animals Act, 1849, it is enacted: "That if any persons shall from and after the passing of this Act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall, for every such offence, forfeit and pay a penalty not exceeding five pounds." Cattle from the American ports were fastened in their pens by short head ropes passed round the base of their horns. These ropes during the voyage scrub off the skin, and become imbedded in the flesh. As soon as possible on arrival, the cattle being landed, these ropes are removed. It was proved before the magistrate that the defendant was a receiver of large consignments of cattle, which he personally received and attended to, and it was for him to have removed or caused to be removed the head ropes. A bullock which arrived in a consignment, and was landed on a Saturday night, was found on the following Monday with a severe wound round the base of the horn, the head rope not having been removed. The magistrate convicted the defendant, who appealed on the ground that no offence under the statute had been committed, that there was no guilty knowledge on his part, and that, if there was any evidence against him, it was not intentional cruelty. *Held* (by Mr. Justice Smith and Mr. Justice Grantham) there being no evidence of guilty knowledge on the defendant's part, the conviction must be quashed.—*Elliot v. Osborn*, High Ct., Q. B. Div., 22 April.

PRACTICE.—*Divorce*—*Permanent allowance to wife*—" *Dum sola et casta vixerit.*"—Where an order is made by the Divorce Division for the payment by a husband of a permanent allowance for the maintenance of the wife, the judge must decide on the circumstances of each case whether or not the *dum sola et casta* clause shall be inserted. There is no rule that the clause should be inserted unless there is some reason to the contrary, nor that it ought to be omitted unless there is some reason for inserting it. An innocent wife obtained a divorce owing to the misconduct of her husband. There were no children of the marriage. The wife had no property, and in consequence of the husband being a man of small means the allowance which he was ordered to make her was small. *Held* (by Lord Justices Lindley, Bowen, and Kay, reversing Mr. Justice Jeune) that the order ought not to contain the *dum sola et casta* clause.—*Wood v. Wood*, Ct. of App., 22 April.

LIBEL.—*Injunction to restrain publication*—*Immediate injury*.—K. circulated statements about S. which appeared *prima facie* to be wholly unjustifiable and were calculated to cause intense annoyance, and which unless justified would be grossly libellous, but it was not shown that their circulation was likely to cause any immediate injury to the person or property of S., who had previously obtained a verdict and judgment for £1000 against K. for the circulation of similar statements. *Held* (by Lords Justices

Lindley, Bowen, and Kay, affirming Mr. Justice North) that an interlocutory injunction to restrain the publication of the statements ought not to be granted.—*Salomons v. Knight*, Ct. of App., 22 April.

MARRIED WOMEN.—*Separate estate—Joint contractor—Judgment recovered against joint contractor—Liability of married woman in second action.*—The plaintiff entered into an agreement with the agent of the defendant's husband, by which the latter was to let a certain house to the plaintiff, who was to have also the option of purchasing the furniture therein. This agreement the defendant's husband broke, and the plaintiff recovered judgment against him; this judgment he only in part satisfied, and then became bankrupt. The present defendant claimed the furniture in the house as her separate property. The plaintiff then commenced this action against the defendant upon the same contract as she had sued the defendant's husband upon, alleging that the husband's agent was also agent for the wife, and that they were not joint contractors, as the wife could only contract in respect of her separate estate, whereas the husband contracted personally. *Held* (by Mr. Justice Smith and Mr. Justice Grantham) that the husband and wife were joint contractors, and that judgment having been recovered against one of two joint contractors, an action was not maintainable against the other joint contractor upon the same contract.—*Hoare v. Niblett*, High Ct., Q. B. Div., 23 April.

INTERNATIONAL COPYRIGHT ACT, 1886 (49 & 50 Vict. c. 33), sec. 6.—*Work produced abroad—Publication in this country—Retrospective effect of Act.*—It is provided by the International Copyright Act, 1886, sec. 6, that where an Order in Council is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such Order comes into operation shall be entitled to the same rights and remedies as if the said Acts and this Act and the said Order had applied to the said foreign country at the date of the said production: provided that where any person has before the date of the publication of an Order in Council lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production, which are subsisting and valuable at the said date. The plaintiff, Mayeur, a French composer, wrote a musical composition which was first produced by him at Paris in November 1877, and by registration there he acquired the copyright of the piece in France, but took no steps to acquire such rights in England. In March 1887 the defendant purchased the score of the music from a publisher in England, and soon after that time and since caused his band at Brighton to perform the same. On December 6, 1887, an Order in Council was issued for the purpose of carrying into effect the Berne Convention, and a Frenchman, having the copyright and sole right of performance in his own country, acquired the

same rights in this country, subject to sec. 6 above set out. The plaintiffs sought to recover damages against the defendant for performing the musical composition of the plaintiff Mayeur, and an injunction. *Held* (by Mr. Justice Smith and Mr. Justice Grantham) that the defendant had not any rights arising from or in connection with the publication or performance of the piece, but that he had an interest subsisting and valuable at the date of the piece, and was therefore entitled to judgment.—*Moul and Mayeur v. Groenings*, High Ct., Q. B. Div., 24 April.

INFANT.—*Guardianship—Custody—Religious education.*—A Protestant was married to a Roman Catholic woman, and previously to their marriage an agreement was executed providing that the children of the marriage should be brought up in the Roman Catholic faith. In March 1883 a daughter was born, who was baptized privately by a Roman Catholic priest, and afterwards publicly in a Roman Catholic church, the godfather and godmothers being also Roman Catholics. In March 1886 the father died intestate at the house of his wife's cousin M., a Protestant, where he was staying with his wife and child. The mother died in October 1889. M. had taken care of the infant with the mother's consent during nearly the whole of the time from the father's death till June 1890, when the infant was forcibly taken from her by C., the mother's brother, a Roman Catholic, and sent to America. The infant was subsequently brought back to England under *habeas corpus* proceedings which had been commenced against C. C. then applied to the Court to have himself appointed guardian of the infant in conjunction with a Roman Catholic bishop, a Roman Catholic solicitor, and the lady superior of a religious home. The application was opposed by the paternal uncle and M., Protestants, who proposed themselves as guardians. *Held* (by Lords Justices Lindley, Bowen, and Kay) that there was no person who had any right at all to the custody of the child, and though the question of religion ought not to be left out of consideration, the question of paramount importance was what was for the interest of the child, and that, under the circumstances, the order of Mr. Justice Chitty refusing to appoint C. and appointing the paternal uncle and M. guardians of the infant, and giving the custody of the infant to M. with liberty to bring her up as a Protestant, ought to be affirmed.—*Re Violet Nevin*, Ct. of App., 24 April.

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.—*Intent—Verdict—Inconsistent findings.*—Upon an indictment for obtaining food and money by means of false pretences, the false pretence alleged being that the prisoner was a bank clerk and received his salary once a fortnight, the jury found the following verdict: "Guilty of obtaining food and money under false pretences; but whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommended the prisoner to mercy." The Recorder, before whom the trial took place, accepted the verdict as being a verdict of guilty upon the authority of *Reg.*

v. Naylor, 10 Cox C. C. 151, where it was held that the crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so. Upon a case reserved it was argued in support of the conviction that the verdict was separable, the latter portion of it being merely the reasons given by the jury for their recommendation; and that, if it was not separable, inasmuch as the falsity of the pretence alleged must of necessity have been known to the prisoner, the only possible meaning which could be given to the latter portion of the verdict was, that the jury considered that at the time the prisoner obtained the food and money he intended at some future time to pay for the food and repay the money. *Held* (by Lord Chief-Justice, and Justices Denman, Mathew, Charles, and Williams) that the verdict was not separable, and that inasmuch as the latter portion of it negatived the intent to defraud, without proof of which the previous portion of the verdict could not have been found, the conviction could not be supported.—*Reg. v. Gray*, Court of Cr. Cas. Res., 25 April.

DESERTION.—*Plea established—Decree.*—The wife petitioned for a divorce on the grounds of desertion coupled with adultery. The marriage took place in April 1875, and in 1876, or early in 1877, there was a temporary separation, which the petitioner stated to have been on account of the respondent's intemperate habits. In 1877 the respondent, who was a hosier at the date of the marriage, finally left his wife, but they continued to correspond for some years. In or about the year 1884 the wife heard rumours as to her husband's mode of life, and subsequently, in 1886, she went to Australia, partly with the object of ascertaining the truth of those rumours, and partly with the object of singing at concerts, by which latter means she was supporting herself and child. She found he was living with a woman, and had children by her. The wife made no request to her husband to return to her, or to take her back to live with him. Subsequently she returned to England, and eventually instituted this suit, charging adultery and desertion in and since 1886. *Held* (by Mr. Justice Jeune) that, although there was, in law, no desertion prior to 1886, yet the fact of his taking up with another woman and starting in another home and not contributing anything to her support, constituted desertion in and since 1886, and the petitioner was entitled to a decree *nisi* for the dissolution of the marriage upon that ground, coupled with adultery.—*Drew v. Drew*, High Ct., P. & D. Div., 27 April.

NULLITY.—*Decree of New Zealand Court—Subsequent acquisition of English domicile—Petition for variation of settlement—22 & 23 Vict. c. 61, s. 5—No jurisdiction in English Court—Application dismissed.*—This was an application by Miss Moore (otherwise Bull) for variation of a marriage settlement, under unprecedented circumstances. The petitioner obtained a decree in New Zealand, declaring her marriage with the respondent null and void. The

ceremony took place in England, in 1884. By an ante-nuptial settlement, drawn in this country, the lady settled certain property in this country, upon trustees resident here; she took only a life interest in the property. Since the date of the decree of nullity the parties had abandoned or lost their domicile in New Zealand, and had, it was suggested, acquired a new domicile in this country. The Court, while recognising the desirability of making the wished-for variation in the marriage settlement, *held* (by Mr. Justice Jeune) that there was no jurisdiction in this Court to entertain the application. The section of the Act of 1869, under which the motion was made, must be read in conjunction with sec. 45 of the first Divorce Act (20 & 21 Vict. c. 85), and the "final decree of nullity" therein referred to must be taken to refer only to a decree of the English, and not to a decree of any other Court. The application must therefore be dismissed.—*Moore* (falsely called *Bull*) v. *Bull*, High Ct., P. & D. Div., 28 April.

COMPANY.—*Shareholder—Misrepresentation—Rescission of contract—Acquiescence.*—The prospectus of a company contained a statement, which was in fact untrue, and on which E. relied in applying for shares in the company, that certain persons were members of a council of administration from which the board of directors would be chosen. Upon discovering the untruth of this statement, E. gave notice of motion to remove his name from the register of shareholders. Subsequently to the notice of motion, E. attended a meeting of the company, but he did not vote or take part in the proceedings, and left before the discussion commenced. He also wrote to the secretary of the company asking the price at which the shares were then quoted. *Held* (by Mr. Justice Kekewich) that Mr. E. had not acted as a shareholder towards the company, or done any act inconsistent with his repudiation of the shares, and that his name must be removed from the register.—*Re Metropolitan Coal Consumers Association; Ex parte Edwards*, High Ct., Ch. Div., 30 April.

SHIP.—*Collision—River Thames—Rules and bye-laws for navigation of the Thames, Art. 24.*—The steamship *A.* had come up the Thames on the flood tide, and having received orders to bring up at some buoys, was about to turn head down. Her whistle was sounded, and her helm was ported, and her anchor let go to help her in swinging round. While she was still across the river, heading towards the north shore, the steamship *R. D.*, which had been following her up the river, came up, and although those on board her saw that the *A.* was doing nothing to keep out of her way in accordance with Art. 24 of the Thames Rules and Bye-laws, she kept on her course, and a collision ensued. *Held* (affirming Court of Appeal) that both vessels were to blame.—*The River Derwent*, House of Lords, 30 April.

LANDLORD AND TENANT.—*Original defect—Liability of tenant.*—In 1886 the plaintiffs leased a house and premises for seven years

to the defendant T., who covenanted generally to keep the premises in good and sufficient repair. In 1889 the defendant G. became bound to perform this covenant by taking an assignment of the lease, and entering thereunder. The drainage system on the said house and premises had been defective from the first, and the drains were out of repair at the date of the lease. In 1890 the local authority interfered by their sanitary inspector, and ordered repairs, which the defendant G. refused to carry out, with the result that the plaintiffs were themselves compelled to repair the drains, which they did, at the same time rectifying the whole system, and adding some modern improvements. The plaintiffs brought this action to recover the expenses to which they had been put, and for damages ; and judgment was reserved on the question, whether under the covenant the defendant G. was liable for the expense, not only of repairing the drains, but also of rectifying the system. *Held* (by Mr. Justice Smith) that the defendant G. was not liable for the expense of improving and remodelling the system of drainage, but only for that to which the plaintiffs had been put in doing the actual repairs. Judgment for plaintiffs to that extent. —*The Planet Building Society v. Turnham and Grellier*, High Ct., Q. B. Div., 4 May.

DIVORCE PRACTICE.—*Queen's Proctor's intervention—Decree nisi obtained by conspiracy of petitioner and co-respondent—Order for Queen's Proctor's costs against co-respondent as well as petitioner.*—In this case the husband had obtained a decree nisi on the ground of his wife's adultery with the co-respondent. The Queen's Proctor thereupon intervened, alleging that the decree had been obtained by withholding material facts from the Court, such facts being (*inter alia*) that the petitioner and co-respondent had conspired to bring about the alleged adultery between the latter and the respondent. The co-respondent was served with a copy of the Queen's Proctor's plea, but filed no answer thereto, and was not represented at the hearing. The petitioner appeared in person and conducted his own case up to the point when he should have presented himself for cross-examination, when he failed to put in an appearance, and sent a letter to the judge saying he was too unwell to attend. Evidence was then given that he had been seen that day in and about the precincts of the Law Courts, and judgment was delivered in favour of the Queen's Proctor, the decree nisi being rescinded, and the petition dismissed ; the petitioner being ordered to pay the costs of the Queen's Proctor's intervention. Thereupon, counsel for the Queen's Proctor asked for an order also against the co-respondent, against whom the Court had found the plea of conspiracy proved. *Held* (by Mr. Justice Henn Collins) that this case was distinguishable from that of *Blackhall v. Blackhall and Clarke* (13 P. Div. 94), upon the ground that in that case the co-respondent was dismissed from the suit at the time the decree was pronounced, whereas, in the present instance, the co-respondent still remained "a party" to the pro-

ceedings, and was, in fact, duly served with a copy of the Queen's Proctor's plea. The Court therefore ordered him to pay the costs incurred by the Queen's Proctor upon this intervention.—*Taplen v. Taplen and Cowen (the Queen's Proctor showing cause)*, High Ct., P. & D. Div., 5 May.

SLANDER.—*Privileged communication—Intimation by host of suspicions concerning acts of guest's servant—No evidence of malice—Moral or social duty of host to convey information.*—During a part of the year 1890 the plaintiff was valet to S., who had received, when the plaintiff entered his service, a two years' character from one person and a year's reference from another person. Whilst on a visit to Edinburgh with S., the plaintiff stayed at the W. Hotel, and on leaving there they went direct to Newcastle-upon-Tyne. On the morning of their departure from the latter town to Manchester, a letter was received from the Chief Constable of Edinburgh by the Chief Constable of Newcastle-upon-Tyne, informing the latter that a lady's gold watch and chain had been stolen from a bedroom at the W. Hotel on the same corridor as that on which the plaintiff's bedroom was located. Although suspicion was conveyed in the letter that the plaintiff might be the person who stole these articles, caution was advised with respect to making inquiries so as not to injure the plaintiff, as there was no evidence against him. The Chief Constable showed the letter to the defendant, the Mayor of Newcastle-upon-Tyne, who, before driving S. from the Mansion House to the railway station, called him into a private room, and made the communication to him which he had received from the Chief Constable. The defendant did not say or intimate that the plaintiff had stolen the watch and chain, but he merely stated that the Edinburgh police suspected the plaintiff of having done so. Shortly after S.'s arrival in London he dismissed the plaintiff. On the plaintiff bringing the present action for slander against the defendant, S. in his evidence, which was taken on commission before he left for America, said that his reason for dismissing the plaintiff was what the defendant had told him. At the trial, at Leeds, of the action on the 9th and 11th August 1890, the defendant claimed that his communication was privileged; but Willa, J., took a different view, and there was a verdict for the plaintiff, damages £250. The defendant applied that judgment might be entered for him or for a new trial, on appeal from the verdict and judgment obtained by the plaintiff. *Held* (by Lords Justices Lindley and Kay, Lord Justice Lopes dissenting) that it was the defendant's moral or social, although not his legal, duty to communicate the information he had received to S.; that the defendant had acted *bonâ fide* in the matter; that the occasion was privileged; and that there was no evidence of malice; that the case ought therefore to have been withdrawn from the jury, and judgment given for the defendant; and that judgment must accordingly be entered for the defendant, with costs. Lord Justice Lopes considered that the defendant in so acting was not discharging any

duty, social or moral ; but that it was an officious and uncalled-for act on his part, and that therefore the occasion was not privileged.
—*Stuart v. Bell*, Ct. of App., 5 May.

INFANT'S MARRIAGE SETTLEMENT.—*Covenant to settle after-acquired property*—*Infants' Marriage Settlement Act* (18 & 19 Vict. c. 43), sec. 1.
—By a settlement dated the 3rd October 1883, made in pursuance of the *Infants' Marriage Settlement Act*, in consideration of the marriage between a husband and wife who was an infant, certain funds, therein called the wife's trust fund, were assigned by the wife to trustees upon trust, to pay the income to the wife for life for her separate use, without power of anticipation ; and after her death upon trust, as to the income, for the benefit of the husband, as therein mentioned, for life, or until he should become bankrupt or alienate the same, and with provisions for the benefit of the husband and children of the marriage in case of such bankruptcy or alienation ; and after the death of the survivor of the husband and wife upon trust, as to the capital and income of the wife's trust fund, for the children or remote issue of the marriage as the wife should, whether covert or sole, by deed or will appoint, and, in default of such appointment, in trust for the children of the marriage who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares. And it was thereby agreed, and each of them, the husband and wife, thereby covenanted with the trustees, that if, besides the funds thereinbefore assigned by the wife, she then was, or if at any time or times during the intended coverture she, or the husband in her right, should become entitled, in any manner and for any estate or interest, to any real or personal property of the value of £100 or upwards at one time, and from one and the same source (except certain specified property which it was thereby agreed should belong to the wife for her separate use), then the husband and wife and all other necessary parties should, at the cost of the trust estate, so soon as might be, and to the satisfaction of the trustees, convey such real or personal property to the trustees upon trust, to sell, call in, and convert, and to stand possessed of the proceeds upon the trusts thereinbefore declared concerning the wife's trust fund, or as near thereto as circumstances would admit. The marriage was solemnised on the 24th October 1883, and the wife attained twenty-one on the 28th January 1886. There were four children of the marriage. The wife's mother died on the 2nd July 1888, having by her will, dated the 25th April 1876, bequeathed to the wife a legacy of £1900 and a share of residue amounting to £2070, 19s. 6d., which moneys were paid over by the mother's executor to the trustees of the marriage settlement on the 23rd January 1889, without any intervention on the part of the wife, who, on the 16th December 1890, gave a notice to the trustees repudiating her consent to settle the after-acquired property, and claiming to have the moneys paid over to her by the trustees of the settlement. The trustees thereupon took out a summons for the determination of

the question whether the wife was bound by her covenant contained in the marriage settlement, and whether the trustees should refund to her the moneys paid over to them. It was contended on behalf of the wife that the words of the Infants' Marriage Settlement Act, that it should be lawful for every infant in contemplation of marriage, with the sanction of the Court of Chancery, to make a "binding settlement, or contract for a settlement, of all or any part of his or her property over which he or she has any power of appointment, whether in possession, reversion, remainder, or expectancy," did not include such a hope of an expectation as the wife might have had of obtaining any property under her mother's will. *Held* (by Mr. Justice North) that the wife's after-acquired property came within words of the Infants' Marriage Settlement Act, and was therefore bound by the covenant to settle such property contained in her marriage settlement.—*Re Johnson's Settlement Trusts*; *Moore v. Johnson*, High Ct., Ch. Div. 7 May.

NUISANCE.—*Waterworks company—Statutory undertaking—Noise and vibration caused by working of pumps—Injunction—Negligence.*—The plaintiff was the occupier of a villa and garden adjoining a piece of land fronting the river Thames. The defendants, being a company with statutory powers, on the 6th October 1890 commenced sinking a shaft on the said piece of land in order to construct a tunnel under the bed of the river for the purpose of laying pipes in connection with their statutory undertaking. In order to sink the shaft, it was necessary to keep the excavation clear of water which accumulated from natural springs, and the defendants at the commencement of their operations used for that purpose certain steam lift pumps, which caused great noise and vibration. The plaintiff made repeated complaints to the defendants, and ultimately, on the 20th October, issued a writ for an injunction and damages. On the 22nd October the defendants substituted centrifugal pumps for the steam-lift pumps. The result of using the centrifugal pumps was to diminish the nuisance. The plaintiff contended that the defendants ought to have used centrifugal pumps in the first instance, so as to conduct their operations with the least possible injury to the plaintiff; and the defendants, on the other hand, contended that the steam-lift pumps were more suitable, and usually employed for such operations, and that they were not bound to use centrifugal pumps. *Held* (by Mr. Justice Williams) that the defendants were not restricted to the use of such machinery as was absolutely necessary for the purposes of their undertaking, and that in the absence of negligence no action lay against the defendants.—*Harrison v. Southwark and Vauxhall Waterworks Company*, High Ct., Ch. Div. 11 May.

TRADE MARK.—*Words not in common use—Combination of words in common use—Patents, Designs, and Trade Marks Act 1883, sec. 64.*—The plaintiffs were the registered owners of a trade mark consisting of the words "Pirie's Parchment Bank." Their application

for registration contained a disclaimer in the following terms: "The applicants do not claim any right to the exclusive use of either the word 'parchment' or the word 'bank' appearing in connection with this mark." On an application by the plaintiffs for an injunction to restrain the defendants from infringing the trade mark, and on an application by the defendants to remove the plaintiffs' trade mark from the register—*Held* (by Mr. Justice Williams) that the words "parchment" and "bank" being each admittedly words in common use, a combination consisting of the two could not be registered as a trade mark under sec. 64 of the Patents, Designs, and Trade Marks Act 1883, that the plaintiffs' trade mark could not be supported as a "brand:" therefore, that the injunction must be refused, and that the trade mark claimed by the plaintiffs must be removed from the register.—*Pirie & Sons v. Goodall & Sons*, High Ct., Ch. Div., 11 May.

TRADE MARK—Injunction—Name of place.—The respondents and their predecessors had carried on a business as brewers for about a hundred years at Stone in Staffordshire, and they sold ale which had become well known in the market as "Stone Ale," and they had registered the words "Stone Ale" as a trade mark. The appellant built a brewery at Stone, and proposed to sell his ale as "M.'s Stone Ale." *Held* that the respondents were entitled to an injunction to restrain the sale under the name of "Stone Ale."—*Montgomery v. Thomson*, House of Lords, 12 May.

FISHERY.—*Non-tidal navigable river—Ownership of soil—Exclusive right to fishery—Public user—Right of public to fish.*—Plaintiff claimed to be the owner of a several fishery in the Thames at Maidenhead, and the owner of the soil of the river. The defendant had fished within the limits of the alleged fishery, and moored punts in or upon the soil. The plaintiff claimed an injunction to restrain these acts. The defendant justified his acts on the grounds that (1) the public had an absolute right to fish in the river Thames as a public and common navigable river; that they had acquired the right to fish in the place in question by sixty years' user; that the defendant was entitled to fish as a holder of a licence from the Thames Conservancy. He further denied the plaintiff's title both to the fishery and the soil. The plaintiff went into evidence, tracing her title to the lands on the bank of the river, and to the soil thereof, and the fishery for seven hundred years, with the exception of a gap from some time in the reign of Charles I., when the manor of Bray, of which the land and fishery in question were part, passed from the Crown into private hands, till 1748; and the Court held that she had established her title for this time. On the other hand, the defendant gave evidence of the public generally having fished without interference for forty or fifty years. *Held*, that the evidence did not establish any fishing by the public as of right, and that such user as was proved would be presumed to be by the permission of the owners and not to raise a right against them; that the alleged right for the

public to fish in a river where private owners have a title to soil is unknown to the law and could not be acquired by prescription; that, even if such a right had been exercised, its non-l character would prevent the Court from finding a legal origin for it by presuming a lost grant, or abandonment of the private right which would be equivalent thereto, during the gap for which title was not known; that the Thames Conservancy had no power under their Acts to interfere with private rights to fish, and the licence in no way professed to do so. A perpetual injunction was granted as claimed.—*Smith v. Andrews*, Ch. Div., 12 May.

WILL.—*Property in a specified foreign country—Exclusion—Intestacy as to all property not in will—Administration to next of kin.*—*Testatrix*, a widow, died in England, December 24, 1890. She left a will, formerly made by her when residing in the United States of America, by which, after revoking all former wills, she, “for the purpose of disposing of my real estate and personal property situated or invested in the United States of America, and expressly limiting the operation of this instrument to my said American property,” appointed two executors in America to carry out her bequests in the said will. The executors duly proved the will at the register office for such purpose at Philadelphia. The daughter and only next-of-kin of the deceased now moved the Court for decree letters of administration, as upon an intestacy, of all property of the deceased, other than that dealt with by the will. The executors assented. The Court (Mr. Justice Jeune), in granting the application—*Held* that this was analogous to the practice of Consistory Courts of the Provinces of Canterbury and York, whose wills dealing exclusively with property in the one province were not admitted to probate in the other province, and *vice versa*. The Court also referred to Williams on Executors, where that practice was commented on and recognised.—*In the Goods of Mary Elizabeth Mann deceased*, High Ct., P. & D. Div., 12 May.

MORTGAGE.—*Valuation—Valuers—Negligence—Loss—Action against valuers—Contractual relation.*—A firm of valuers was employed to value certain property with a view to its being offered as a mortgage security. The valuers were suggested by a firm of solicitors who were to find a mortgagee, it being understood, by the valuers and the solicitors, that the valuation was to be made on behalf of the intended mortgagee. The plaintiff, who was a client of the solicitors, became the mortgagee, as all parties understood, on the faith of the valuation being made by the valuers and their advisers. The valuation was not, in the opinion of the Court, conducted with due skill and care, and the security turned out greatly insufficient. The plaintiff brought an action for damages against the valuers and the solicitors for negligence and breach of duty. As against the solicitors, it appeared that they were aware that there had been in previous dealings with the property striking differences in the prices paid for it, but that the soli-

having called the attention of the valuers to this fact the valuers adhered to their valuation, and the solicitors had not told the plaintiff of the difference in prices. It was decided by Mr. Justice Romer that, as the solicitors knew that the plaintiff relied upon the valuation and would be guided by it, no negligence had been shown by the solicitors, and the plaintiff had no claim against them. As regarded the valuers, his Lordship decided that there being a contractual relation between them and the plaintiff, they were liable in damages by reason of their not having used due skill and care. His Lordship further decided that, in the absence of any contractual relation between the valuers and plaintiff, *i.e.*, if the plaintiff had been in a legal sense a stranger to the valuers, the action could not have succeeded against them except as an action of deceit, in which case, after the decision of the House of Lords in *Derry v. Peek* (14 App. Cas. 337), it would have been necessary to show fraud; nor, in the absence of fraud and of contractual relation, would the valuers have been liable on the ground of having invited the plaintiff to act upon their valuation. The valuers appealed. *Held* (by Lords Justices Lindley, Lopes, and Kay) that the true inference to be drawn from the evidence, apart from an admission contained in the pleadings, was that the valuers were actually employed by the plaintiff: and that, as they had been negligent in the performance of the work undertaken, they were liable to the plaintiff for the damages caused by such negligence.—*Scholes v. Brook*, Ct. of App., 14 May.

COMPANY.—*Winding-up—Calls—Agreement to pay unpaid capital by instalments at fixed dates—Right of liquidator to immediate call for whole amount unpaid—Companies Act 1862, secs. 7, 101, 102.*—By an agreement made on the reconstruction of a company it was provided that, as part of the consideration for the sale of the assets of the old company to the new company, the new company should allot to the shareholders of the old company shares in proportion to their shares in the old company, with certain sums credited as having been paid up thereon, and that the sums remaining to be paid on such shares should be payable by the shareholders to the new company at certain fixed dates, of which the last two were the 1st Aug. 1891 and the 1st Feb. 1892. The agreement was confirmed by resolutions of the old company; and, in response to a circular by the new company, inviting applications for shares on the terms of the agreement, the defendants applied for and were allotted shares. The memorandum of association of the new company stated that one of the objects of the company was to carry out the agreement, and it was adopted and scheduled in full in the articles. A compulsory winding-up order had been made against the new company. On an application by the official liquidator for an order calling up at once all the instalments remaining unpaid on the shares—*Held* (by Mr. Justice Kekewich) that the agreement was at an end upon the winding-up order being made, and that the shareholders were liable to pay up at once all sums remaining due.

on the shares.—*Re Cordova Union Gold Company Limited*, High Ct. Ch. Div., 14 May.

COMPANY.—*Transfer of shares—Inchoate title—Priorities.*—Part of the residuary estate of a testator had been invested by B., one of the executors and trustees, in his own name, in the shares of a company. The company's articles provided that no person should exercise any rights of a shareholder until he had been registered; that every transfer of a share not affected by operation of law should be made in such form as the directors should from time to time approve. The directors had fourteen days within which to approve of or decline a proposed transferee. B. fraudulently deposited the certificates of the shares with the defendants' bank to secure his own debt, together with a transfer which was in blank as to the names of the transferees and the numbers of the shares. On July 19, 1889, the defendants filled in the names of some proposed transferees, and left the transfer with the company for registration. On July 20 the plaintiffs, who were the beneficiaries under the will, served the company with notice of their prior equitable claim, the company not then having registered or approved the transfer. The company never approved of or registered the transfer. *Held* (by Mr. Justice Romer), that the company having a right under their articles, which they had exercised, of refusing to register the transfer, the prior equitable title of the plaintiffs to the shares prevailed over that of the defendant bank. As between two persons claiming title to shares in such a company, which shares are registered in the name of a third party, the prior right prevails unless the claimant second in point of time can show that, as between himself and the company, before the company received notice of the claim of the first claimant, he has been clothed with the full position of a shareholder; or, at any rate, that all the formalities have been complied with, or that nothing more than some ministerial act which, as between the company and himself, the company could not refuse to do forthwith is required, so that as between the company and himself he may be said to have a present absolute right to be registered before the company have notice of a better title.—*Moore v. The North-Western Bank*, High Ct., Ch. Div.

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AND

SCOTTISH LAW MAGAZINE.

Editorial.

Scottish Private Bill Procedure.—The good old annual custom of abandoning the Private Bill Procedure (Scotland) Bill took place in the House of Commons one night last month, with the usual quaint ceremonial. We understand that it is not proposed to introduce any new features into the ceremony of abandonment next year. Precisely the same formula will be observed as in previous sessions. Some say that public interest in the annual abandonment has died out as the novelty of the proceeding has worn off with years. But this seems open to doubt. In any case, we do not share the views of those scoffers who see anything ridiculous or farcical in the ceremony; and the quaint *fictio juris*, of reluctance and lack of time, strikes us as both interesting and attractive.

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Time-about Judgments.—When a judge draws back for an instant the curtain which veils the principles that guide the secret deliberations of the Bench, it behoves lawyers to listen and mark. The conscientious counsellor, when advising a client on the probabilities of success in proposed litigation, will do well hereafter to have in view the following important dictum of the President of one of the Divisions of the Court of Session. In a case last month, a question arose as

to awarding expenses where, at a discussion of issues, vancy also had been raised. Counsel, by way of h things, stated that in similar circumstances their lordsh "the other Division" are in use to grant expenses. judge at once interposed that on such a point the rule co-ordinate Court was not binding on *them*. "No," sa lordship in the chair; "this is matter entirely within o cretion." Then, with captivating candour and *nair* added: "*Sometimes we just decide a case one way, and times we decide it the other way!*" Could anything be frank?



Cross-examining the Bar.—We have heard modern mentary candidates lament the good old days before h with all its refinements, ever was. Then a man, if h but watchfulness and agility enough to dodge the m might deliver a set speech precisely as it had been con and rehearsed. Now it is otherwise; for, when your is thrilling you about the great fundamental princip liberty, in defence of which glorified ancestors broke and shed blood, your voter will irrelevantly interrup about oleo-margarine or divorce-court disclosures. Y lightened electors are not the only sinners in this directio are would-be members of parliament the only sufferers the Attorney-General has declared, and so we all know a banquet to the English judges at the Mansion Hou other day, Sir Richard Webster replied to the toast Bar. In the course of that reply he remarked that h been reading recently speeches of Attorneys-General : past, and had noticed that to a great extent their argu were permitted to proceed without interruption. No said, it was very different. A distinguished member o present Bench had told him, not many years ago, that th advocate was no longer the man who prepared the oration, but he who could best meet the cross-examinat the Bench. And, after all, it needs no ghost risen from dead to tell us this. Cicero would be a very small m our Courts to-day, and, in the estimation of our judges, n at all. He would be advised to confine the display

talents to a debating society—or to a pulpit, where alone in all this weary combative world you may have it your own way without question. With some tribunals cross-examination of counsel or agent, as the case may be, is the only recognised mode of trial. In so far as it is followed in order to clear up obscurity, or to sweep away wordiness and irrelevance, the process is an improvement; but when it is practised from mere impatience or querulousness, or to display to bystanders the acumen of the cross-examiner (motives by no means unknown), it is extremely objectionable, “and shows a pitiful ambition in the — !” The quotation might sound rude.



The Baccarat Slander Case.—Sir William Gordon-Cumming has, through the instrumentality of that infallible institution the British Jury, failed in his attempt to recover damages against his hospitable entertainers and certain of their select circle. He has also, through the operation of martial law, been removed from the Army List. As to the former of these turns of fortune's wheel, Sir William does not, it is said, intend to move for a new trial. No doubt in this he is well advised. The summing-up of the judge in the case did not strictly amount to misdirection; it was only woefully and markedly unfair; and it out-Russelled Russell for the defence. Its offensive toadyism has, of course, no bearing on the matter of a new trial; but it completes a performance wholly worthy of the present Lord Chief-Justice of England. The country, however, has constituted itself a court of review, and while its decision has varied as to many incidents in the sordid story, it has been on the whole very unanimous in its condemnation of much besides Sir W. Gordon-Cumming's conduct in the affair. The issue before the jury was not definitely Yes or No to the question of the plaintiff's cheating at cards; but was merely an issue of damages for slander. This distinction means much in the minds of a jury, whose habitual attitude is that of seeking a loophole of escape from condemning anybody. It might be too much, therefore, to allege that the verdict was so violently contrary to the evidence as to warrant a new trial. But we frankly admit that we should have had rather more respect for these representatives

of trial by jury had they failed to agree on a verdict at all. Again, it is hard to perceive or conjecture what object a certain eminent personage can have had in sitting through a trial in the issue of which his princely reputation was gravely concerned. The particular judge and jury in question (for all have not the hardy courage of Sir Edward Clarke) would obviously have been better to be free of the influence of his presence while discharging their duty. It would have been not only more becoming, but more conducive to the attainment of justice, had he left the Court when he left the witness-box. The one bright spot in the whole sorry business was the consummate skill shown from first to last in the conduct of the defence by the Solicitor-General for England. Nothing could excel the brilliance, the fearlessness, and the sterling forensic ability of his concluding speech to the jury.

* * *

The Legislative Zeal of Lawyers.—When the time came round for Mr. Atherley Jones, M.P., to make his motion (to which we referred last month) anent the expediency of appointing a Royal Commission to inquire into the working of the English Judicature Acts, the House of Commons was counted out. It is on record that of the thirty-eight members present, only two were lawyers—viz. Mr. Atherley Jones himself and his seconder, Mr. Pitt Lewis. Yet it cannot be doubted that practitioners in England are seriously dissatisfied and are anxious for some remedy for the inconvenience and delay which still exist. It is the familiar story. Lawyers are too busy with pressing business of their own to give serious attention to anything that can, by any possibility, wait. If it rested with the legal members alone, the House of Commons would, as a habitual rule, be counted out before dinner each evening.

* * *

Vexatious Litigation.—An important point with regard to the powers of Sheriff Courts has been decided by Sheriff Berry in a case which we report this month. The form and merits of the action are immaterial. The important feature in the case is a minute, lodged for the defenders,

which prayed the court to make an order prohibiting the pursuer from hereafter bringing any action in the Courts of Lanarkshire against the defenders without special leave of the Court. This crave was supported by a statement that the pending action was the nineteenth brought by the pursuer against the defenders; that in every case he had been unsuccessful; but that notwithstanding this, the defenders had been put to serious annoyance and expense, and had been unable to recover expenses from the pursuer. His lordship, for the reason set forth in his interlocutor, has held, with obvious regret, that a local Court has not the power to grant the protection sought for in this minute—"although there are reasons which may be regarded as cogent for holding that it ought to be possessed of a certain control of proceedings before itself. It may be said that a person harassed by repeated actions of a groundless nature before a Sheriff Court ought not, in order to have them stopped, to be obliged to resort for protection to the Supreme Court." It will be well, in any future legislation concerning the jurisdiction and powers of the Sheriff Courts, to give effect to the lesson of this decision, by empowering Sheriffs to grant the remedy themselves. There is greater risk of purely vexatious litigation in the local than in the Supreme Courts.

* * *

Judicature Acts Amendment Bill.—A Bill has been introduced into the House of Lords by the Lord Chancellor, which introduces two useful aids to the English Bench. Section 1 makes it lawful for any person who has held the office of Lord Chancellor, if upon the request of the Lord Chancellor he consents so to do, to sit and act as a judge of the High Court or of the Court of Appeal, and while so sitting and acting he shall have all the jurisdiction, power, and authority of a judge of either of those Courts, and shall rank therein according to his precedence as a peer. The second section relates to some points of precedence amongst the judges; and the third section enacts that, for the purpose of aiding the House of Lords in the hearing and determination of appeals in Admiralty actions, the House may in any such appeal in which it may think it expedient to do so call in the aid

of one or more assessors specially qualified, and hear such appeal wholly or partially with the assistance of such assessors.

Special Articles.

THE STATE OF BUSINESS IN THE COURT OF SESSION—THE ABUSE OF THE ADJUSTMENT ROLL.

THIS time last year the impatient suitor was airing in the daily papers his grievance against the law's delay, and sundry practitioners before the Supreme Court were loudly complaining of the block of business which barred the way of many an appeal and reclaiming note into the Divisional Courts of the Inner House. Were it not that lawyers are not allowed to have any grievances, they might find no small ground for recriminations against a non-litigious public in the present dearth of business in the Court of Session. The roll of the Second Division has fairly run dry, and their lordships of the First Division can only spare for transference a dozen cases from their own attenuated lists. The captiously inclined might, however, still find a subject of remark in the unusually large number of proofs and jury trials which throughout the latter half of this session cluster thick on the rolls of the Lords Ordinary, and weekly invade the privacy and calm of their lordships' blank days; but it is rumoured that the judges have in prospect the passing of an Act of Sederunt whereby, if parties consent, jury causes in which no day has yet been fixed for trial, and which therefore would in the ordinary course drag out their weary length in the sittings, may be taken by the Inner House judges who have no more work to do during the remaining weeks of the summer session. All this expedition, however, has its inconveniences, and one of them is so serious as to claim the attention of all branches of the profession. During the earlier part of the session most of the Outer House judges had practically cleared their Procedure Rolls, with the result that it frequently happened that a case which was in the Adjustment Roll of one week appeared in the Procedure Roll of the next. Now, it is the inveterate habit of agents to instruct

counsel for the Adjustment Roll not earlier than the previous evening, and it is the inveterate habit of counsel to invert the order of things originally intended by those who fashioned the forms of our judicial procedure, by formally closing the record first, and tackling the delicate problem of adjustment afterwards. If the agents practising before the Supreme Court were less skilful draughtsmen than they are, or if they had less confidence in their own competency to perform the proper work of junior counsel than they have, it might be that session papers would be drawn by counsel as the rule instead of—we had almost said—the exception; and in that case an advocate might be in a position to adjust at short notice on simply seeing what kind of case was made against his client. But the print of an open record is very frequently the first and only information regarding a suit sent to counsel with his instructions to attend at the Lord Ordinary's bar next morning and move that the record be closed and the case sent to the Procedure Roll. The result is that days, often weeks, elapse before the closed record is actually printed off, all that time being occupied in communications between the agent and his country correspondent as to the grounds for this or that averment—communications which ought to have been completed before the summons or the defences were drawn. This way of doing worked well enough when Procedure Rolls were full and a month's armistice followed the first formal interchange of shots between the contending parties at "closing," but it does not work at all now that adjustment is the immediate prelude to a drawn battle on the Procedure Roll. Applications for delay, with all the petty annoyances and disappointments which attend such applications, have consequently been of frequent occurrence this summer in the Outer House. The remedy lies with the agents and their correspondents in the country. Either let them send the whole information they have to counsel at the start and instruct him to draw the papers, or let them get the information well in hand themselves, and instruct counsel for adjustment at least three or four days before the cause is put out for closing.

J. A. C.

*THE EVIDENCE OF SPOUSES IN CRIMINAL
CASES.*

THE Evidence in Criminal Cases Bill, introduced into the House of Lords by the Lord Chancellor, has met with very general approval, although of course one or two dissentient voices have been heard. Its object is to make it competent for persons charged with crimes, or the wives or husbands of persons charged with crimes, to give evidence. If carried, this measure will put criminal law in the same position as civil law in this respect, for in the latter such evidence is already admissible. Even in criminal cases, as Lord Herschell has put it, the law which prevents prisoners giving evidence "has been consistently eaten into" by one statute after another. The consequent anomalies in the existing rules affecting the evidence of the accused have for some time excited surprise and ridicule, and it is time they were removed. The Criminal Law Amendment Act introduced an exception to the general principle that the prisoner's evidence must be excluded; but within that Act itself there is the startling anomaly that the accused is not competent as a witness unless charged with the gravest offence. Further, as the Lord Chancellor pointed out at the second reading of the Bill, under recent enactments a man charged with the possession of explosives, or with sending an unseaworthy ship to sea, may give evidence in his defence; but if the explosive has exploded, or if the unseaworthy ship has gone down, and the man is put on his trial for culpable homicide, it is not permissible for him to give evidence. Amendment of the law of evidence in this respect is therefore sorely needed. In Scotland, according to present practice, a prisoner's only opportunity of offering any explanation or evidence on his own behalf is when he emits his declaration. This document, however, he cannot call for at the trial, though it may be used against him; and even now, although it is made after an interview with his law agent, who may be present to advise him, this statement is made in very unfavourable circumstances, and in ignorance of the evidence which it has to meet.

As regards the wife or husband of an accused person, the present law in Scotland is that spouses cannot give evidence for or against each other, except where the spouse is the injured party—as, for example, in the case of an assault by a man on his wife, or where he is charged with having falsely accused his wife of a crime. In order to exclude on this ground a person who is tendered as a witness, there must be proof of a true marriage with the prisoner. In the case of *Her Majesty's Advocate v. Henry Reid*, a trial for murder at Ayr Circuit in 1873 (2 Coup. 415), the prisoner in his declaration stated that one of the witnesses for the Crown was *not* his wife. When she was called, panel's counsel objected that she was not a competent witness against him, because, according to the law of Scotland, she was his wife, although they were not regularly married. But the Court held that the woman was not his wife, and her evidence was admitted. An injured spouse is not only a competent, but also a compellable witness (Dickson, II. sec. 1723). There have been some narrow cases. Thus in the case of *George Loughton* in 1831 (Bell's Notes, 241), where the offence was committed against the wife and child, it was held that the wife could be examined as to the injury to herself, but not as to that to the child.

The proposed change is in every way desirable. For a considerable period past, the tendency in Scotland has been to get rid of questions of admissibility of witnesses by throwing all on to a question of their credibility. This seems the right direction—even in the case of trials by jury. The objection of those who have echoed Lord Denman's eccentric question, "Why are defendants to be forced (*sic*) to commit perjury as well as the crimes of which they are accused?" would equally reject the evidence of the parties to any civil action. Gold, as Romeo informed the lean apothecary, is worse poison to men's souls than the poor compounds that he might not sell; and we are certain that it is quite as potent a provoker of perjury.

J. C.

THE CRIMINAL JURISDICTION OF THE SHERIFF.

THE bill of suspension at the instance of the Procurator-Fiscal against the Sheriff of Caithness, in which Lord Low has passed the note for the trial of the cause, raises questions concerning the jurisdiction of the Sheriff in criminal matters which are of historical and antiquarian as well as of legal interest. It would be improper at this stage to pass any opinion on the questions which will fall to the Court to judge of, but the benefit of some researches made generally in connection with the Sheriff's jurisdiction and power may be of general interest.

Notwithstanding that the office of Sheriff is very old, it is beyond doubt that the division of the country into shires is still older. Long before the country could pretend to be a consolidated kingdom, a division of it into portions closely resembling our present shires may easily be traced. The most probable theory is that the shires consisted of the lands which the martial or other power of the clans or tribes enabled them to keep to themselves. Many of the counties, such, for example, as the Kingdom of Fife, may be traced back to this stage.

The institution to which was intrusted the administration of justice within the shire or earldom when the historic period began was the Earl's Court. The earldoms were hereditary, and the Sheriff was the hereditary legal adviser in their Courts.

A very curious statute, passed while the Sheriff was a hereditary official, but long before it was necessary for him to be a trained lawyer, is worthy of notice here. The statute is one passed by one of the Parliaments of James IV. (1494, c. 54). It is as follows:—

“ Item, it is statute and ordained throw all the Realme that all Barronnes and Free-halders, that ar of substance put their eldest sonnes and aires to the Schules, fra they be six or nine zeires of age, and till remaine at the Grammar schules quhill they be competentlie founded and have perfite Latine. And thereafter to remaine three zeires at the Schules of Art and jure; swa that they might have knowledge and understanding of the Lawes; Throw the quhilks justice may remaine uni-

versally throw all the Realme; swa that they that ar Schireffs or Judges Ordinares, under the King's Hienesse, may have knowledge to doe justice, that the puir people sulde have na need to seek our Soveraine Lordis principal Auditor for ilk small injurie," etc.

The Earl's Courts were really popular assemblies, which all the freeholders attended, and which were presided over by the Earl himself. The freeholders acted as juries, and in the earliest records of the Sheriff Courts juries of varying numbers are found. In very early times, the Sheriff was required to leave the Court when the members deliberated (Scots Acts, fol. vol. i. Assize of King David, p. 5). It was only in the absence of the Earl that the Sheriff presided, and it was through the freeholders' failure to attend regularly that the Sheriff became sole judge. Sir Thomas Craig (*Jus. Foedale*, lib. 1, dieg. 12, sec. 14) expresses the opinion that the Sheriff (*Viccomes*) came in place of the ancient *Comes*, or Earl, a person who had a large tract of land granted to him heritably by the sovereign, with jurisdiction attached to it. His words are:—

"Reges jurisdictionem assumpserunt, aliosque sibi subdelegebant. Inde praecepti juri dicendo, *Viccomites*, et Praefecturae, *Viccomitatus*, dicebantur; sed in his etiam, ut plurimum jurisdictio est facta hereditaria magna cum reip. malo. *Viccomites* nos *Schireffs* dicimus."

But the hereditary Sheriff of later times can hardly be regarded as the lineal descendant of the legal adviser of the Earl's Court. Indeed, the office of Sheriff seems to have disappeared for several centuries, during which the administration of justice in the counties seems to have been chiefly in the hands of the Courts of the Baronies, Regalities, and Burghs. But as the country became more consolidated, and the kingly power gained in strength, the office of Sheriff was revived. The Sheriff, when the office was revived, was generally known as the King's Sheriff, and he was the representative of the king in the county, and appointed as a check upon the Earls and Barons. As Bankton puts it (ii. 571):—"Antiently the Sheriff of the county had power to review and reduce the decrees of baron-courts within his territory, and to advocate causes from them in case of injustice or

wrong done by these Courts. This, I conceive, proceeded from the original intent of the institution of Sheriffs, who were appointed by the king in respect that the barons and other feudal lords failed in the administration of justice, and to correct the abuses committed by them. But thereafter, upon appointment of the antient Court of the Lords of Session, who were a committee of Parliament, the Sheriffs ceased to have such power. And more especially upon institution of the College of Justice, as now modelled, the power of reviewing the decrees or proceedings of all inferior Courts in civil actions, came to be vested in the Court of Session, as in criminal causes in the Court of Justiciary, and which is further ascertained by the regulations of 1672."

Notwithstanding that very large powers were given to Sheriffs in early times, the king always reserved to himself and his Council power, if they saw fit, to deal with any of the matters which would in ordinary circumstances fall within the jurisdiction of the Sheriff. The Act 1469, c. 26, contains such a reservation. It runs as follows:—"As to the article of Schireffes, and uthir Judges Ordinar, quhilkis will not execute their office and minister justice to the puir people; It is statute and ordained that the partie compleinze and in ony parte of the Realme, sall first come till his Judge Ordinar of Temporal Landes as Justices, Schireffes, Stewartes, Baillie or Baronne, Provost or Baillies of Burrowes, and make his complaint, and aske at him administration of justice. And gif he gets justice dewlie execute and ministrare to him, he mon remaine content. And gif the Judge Ordinar failzie him and will not minister him justice, he sall cum to the King and his Councel and take letters of summoundes and summond the partie and in likewise his Judge Ordinar quhat ever he be of temporal landes. . . . Nevertheless it sall be lauchfull to the King's Hienes to take decision of ony matter that cummis before him, at his empleasance, like as it was wont to be of before."

In order to secure the proper performance by the Sheriff of the duties of his office, it was provided that the King's Justiciar should, when he made his circuit, or aire, arraign the Sheriffs for malversation in office. "It is statute and ordaint that the Justice sall accuse in his Justice air, the

Schireff and utheris the king's officiaris" (Stat. Ro. III. ex lib. Scon.). By the statute 1487, c. 123, of King James III., it is provided that the Schiref and Coroner should "thole ane assise the last day of the air."

For a very long time Sheriff Courts existed side by side with the Courts of the regality, barony, and burgh. Indeed, the lords of regality seem to have had a wider jurisdiction than the Sheriff. In civil matters they possessed an equal jurisdiction with him, while in criminal matters they were competent to try the four pleas of the crown which from time immemorial have been excluded from the jurisdiction of the Sheriff, with one slight exception shortly to be noticed. If the Sheriff attempted to try a prisoner who was subject to a regality it was competent to the lord of the regality to have him repledged or reclaimed to his own Court on giving a guarantee that the prisoner would be tried within a year. The Baron's Court also had a cumulative jurisdiction with the Sheriff's Court, with a similar right of repledging. So also had the Burgh Courts, which were presided over by the magistrates. But the Sheriff's power increased with the power of the monarch, and through time the power of the lords of regality became doomed. After the rebellion of 1745, the Heritable Jurisdictions Act was passed (20 Geo. II. c. 43). By this Act all heritable jurisdictions of justiciary, all regalities and heritable baileries, and inferior constabularies, and all stewartries and sheriffships of smaller districts which were only part of counties, were abolished, and the powers formerly vested in them were in future ordained to be exercised by such of the King's Courts as such powers would have pertained to had heritable jurisdictions never existed. All sheriffships and stewartries not dissolved by the statute, that is to say, all those which embraced whole counties, were resumed and annexed to the Crown, and the right of appointment to any high sheriffship or high stewardry was limited to the appointment of such an officer for a term of not more than one year. Such high sheriff or high steward was in future not to be competent to judge personally in any action, civil or criminal. The Sheriff's judicial powers were transferred to the Sheriff-Depute, who was in future to be appointed by the king in every shire or stewardry. He was to be an

advocate of three years' standing, and was declared incapable of acting in any cause from his own county. Since the date of the Heritable Jurisdictions Act of 1748 several other statutes have been passed relating to the qualifications and appointment of Sheriffs-Depute or Sheriffs-Principal and their substitutes, but to all intents and purposes the office is the same to-day as it was when re-constituted by the Act of 1748.

The Heritable Jurisdictions Act, however, did not apply to Burgh Courts, and they continued in the exercise of their powers until in many places they died a natural death. In many of the larger burghs they endured till the beginning of the present century, and in one or two burghs they are still in existence, but in these the magistrates for the most part are confined to the jurisdiction allowed to them by a special Police Act. "The burghs, like the barons, were beguiled into accepting charters, and then the Law Courts took the charters as the measure of their rights. If the burgh magistrates were not made Sheriffs by the charter, the King's Sheriffs had the jurisdiction; if they had a grant of sheriffdom, the King's Sheriffs were held to have concurrent jurisdiction unless expressly excluded" (Dove Wilson's *Sheriff Court Practice*—Historical Introduction).

To speak more particularly of the criminal jurisdiction of the Sheriff, it may be said that originally it was nearly as extensive within his county as that of the King's Justiciar himself. "*Item*, The Schiref sould be examinat particularlie concerning all lawis, statutis and ordinances of the realme, how they have causit keip and observe the samin, and in quhat maner they have causit punish the transgressouris and brekkaris thair of within thair Schirefdome" (Balfour's *Practicks*, p. 17). Soon, however, what are known as the four pleas of the Crown were reserved for the Justiciar to deal with. But it was still competent for the Sheriff to try these crimes when ordered by the Justiciar to do so. And it was competent for the Sheriff to try a murderer if he were caught redhand, or, as the statute of 1496, c. 95, puts it, if the doer of the murder were caught "that samin day, before the sun goe doune."

A passage from Balfour's *Practicks* (p. 503) gives an

indication of the extent of the jurisdiction of the various Courts in their criminal capacity in the early part of the sixteenth century. The passage runs thus:—

“A criminal action or cause is that quhilk tuichis ane pane of blude, of life or limb: and sum thair of pertenis to the King's Crown or Court, sum to the Schiref Court, and sum to Bischoppis, Abbotis, Erlis, Baronis, and uther frehalderis.

“To the King's great Court, or Crown, pertenis the crime of tresoun or lese-majestie, as of the King's slauchter and deith, or deceit of the realme, or of the hoist: and siclike to his crown pertenis the cause of fraudful hyding or conceiling of ony hurd or thesaure. *Item*, The breking of the King's peace or protection, burning, reif, ravisching of women, murther, and all uther siclike trespassis, the quhilk may be punist be deith or cutting off or wanting of ony member. *Item*, The crimes of thift and manslauchter pertenis and sould be decernit be ane assise of nichtbouris befor the Justice; for in this cais na certane persewar compeirand to persew, the King or his Justice may accuse and persew. *Item*, The crime of foirstalling, the crime of geving of false dome and judgment, of false money, of false weichtis, of false mesouris, of false instrumentis or evidendis, and of false assisis comitand wilful errour, pertenis to the King's Court.

“To the Schiref pertenis the crime of thift and manslauchter, quhen ane special persoun compeiris to persew. *Item*, Quhen ony Lord failzies to do justice, the Schiref, for thair default, may cognosce anent tulzeing, straikis and woundis, gif the persewar alledge the King's peace to be brokin be committing of the crime.

“Criminal actiounis in like manner pertenis to the courtis and jurisdiction of sum Bischoppis, Abbotis, Erlis, Baronis, and utheris frehalderis, and speciallie to thame quha has and haldis thair lands with sok and sak, pit and gallows thole, theme, infang theif, and outfang theif, exceptand the crimes quhilkis pertenis to the King's Crown.”

The Sheriff's jurisdiction at this time would appear to be much less than it undoubtedly was in later times, but we find that Sir John Skene in his *De Verborum Significatione*, written very shortly afterwards, includes almost every crime among

the criminal causes pertaining to the Sheriff, with the exception of the four pleas of the Crown; but he too gives the Sheriff jurisdiction to try murder where the murderer is apprehended redhand. Even in the present century, when capital punishment was inflicted for other crimes than murder, it was competent and usual for the Sheriff to inflict the highest penalty of the law.

From the passage quoted from Balfour's *Practicks*, it would almost appear that the Sheriff had only powers of trial where the person injured appeared to pursue. Skene, however, on the authority of certain Scottish statutes, says that "generallie the Schireff may follow and persew all trespassours in the Kinges name, and cause his mairies and serjandes arriest them albeit na partie persewer compeir or assist. Like as the thesaurer, and advocate, may persew slauchter, and uther crimes, albeit the parties keipe silence, or utherwaies privatlie agree."

The king's thesaurer is here referred to as a public prosecutor along with the king's advocate, and this may throw some light upon the office of procurator-fiscal. Part of the Sheriff's duties in ancient times was to collect within his sheriffdom the Crown revenue, and the procurator-fiscal was the person whom he appointed to assist him in that duty. Probably the exchequer duties of the procurator-fiscal were not so extensive as to prevent him doing other work, and the example of the king's thesaurer acting as a public prosecutor may have led to the utilising of the services of an existing official to perform duties which were almost inconsistent with the duties of the Sheriff whenever he took up his judicial duties in the trial of criminals. Whether this be so or not, it is certain that the duties of the procurator-fiscal gradually but completely changed, and he was very soon fully recognised as the prosecutor in the public interest in inferior Courts. The procurator-fiscal was appointed by the Sheriff, and till 1877 was removable by the Sheriff. He is an official who seems to have been ignored by both the Legislature and the institutional writer. We find him, however, described as the "procurator who is charged with the prosecution of criminal offences on behalf of the Crown" in the Sheriff Court, and elsewhere as the "representative of the Lord Advocate" in

inferior Courts. According to modern practice, he is considered to be the servant of the Crown. By the Sheriff Courts (Scotland) Act, 1877 (40 & 41 Vict. c. 50), it is provided (secs. 5 and 6) that the appointment of procurators-fiscal in the Sheriff Court shall in future be made by the Sheriff with the approval of one of Her Majesty's Principal Secretaries of State, and that he shall not be removable from office except by one of Her Majesty's Principal Secretaries of State, and only for inability or misbehaviour, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.

The Sheriff-Clerk has always been on a different footing. He is and has always been appointed by the Crown. "All Schireffis sould have ane clerk deput to thame be the King; the quhilk sall have na lig nor band, or ony wayis be bund and oblist to the Schiref, bot to the King allanerlie" (Balfour's *Practicks*, p. 18).

But the procurator-fiscal is more than prosecutor; he is charged with the investigation of alleged crimes in the public interest, and in this duty he may be considered to be the servant both of the Crown and of the Sheriff, for the Sheriff within his sherriffdom is charged with the preservation of the public peace. "Schireffs suld be in all and sindrie parts throwout the haill realme, and specialle in the north partes and west partes of the samin, sik as the North Iles and South Iles, for the acqueting of the peopill" (James IV., 6th Parliament, c. 61). When, however, the trial begins, and the Sheriff takes up his judicial rather than his executive duty, the procurator-fiscal acts quite independently of him. The Sheriff can only sentence an accused person who is found guilty "on the motion of the prosecutor." (See Regulations as to Procedure in Criminal Causes in the Sheriff Court in Act of Adjournal, dated 17th March 1827), and instances have been known where procurators-fiscal refused to move for sentence, when the Sheriff would not agree to impose a small sentence, and the accused was accordingly liberated. In the absence of the public hangman, the Sheriff is bound to perform the duties, but we doubt whether he can order the procurator-fiscal to perform them for him.

J. C. G.

A LEGAL VIEW OF THE ORDINANCE ON GRADUATION IN ARTS.

THE draft ordinance issued on 26th May is of special interest to the legal profession. It proposes to recognise four out of the six Law Classes in Edinburgh University as partly qualifying for an Arts degree. This is not an innovation so much as a revival. Down to the beginning of this century, professors of moral philosophy taught politics, political economy, and international law, as by definition branches of their main subject. The introduction of the Kantian system and the development of the historical method have tended to make moral philosophy partly a metaphysic and partly a history of ethics. Economics has now vindicated for itself a separate place as important as ethics itself, while international law as well as constitutional law have each gathered around them, first, a large body of positive doctrine; secondly, a body of metaphysical and speculative literature; and thirdly, a body of historical literature of their own. In point of fact, any one of these branches is now much more voluminous than moral philosophy in the days of Adam Smith, for they practically include his moral philosophy and a great deal more.

The ordinance must be regarded as a fair attempt to compromise conflicting interests, with a bias, however, greater than is really necessary in favour of the *ancien régime*. If the curriculum is reduced to three years, why should the student not take the summer session in addition to the winter? At present the student pays £36 odds in fees: it is proposed for the future to let him off with £25, unless the fees are to be raised. But these points may be left to the academic critics. From the lawyer's point of view, one or two other criticisms may be made: (1) From what has already been observed, it will be evident that the division of mental philosophy from law and history cannot be justified. Though the line of cleavage between the mathematical and the natural sciences is clear, yet the Commissioners have, in our humble opinion, rightly grouped all in one department of science.

The same reasons should have deterred them from dividing subjects hitherto treated as a single group where the line of cleavage must be purely arbitrary. Groups two and four should be one, under the title of *Philosophy*. Every institution, every idea has a history, and gives rise to metaphysical problems. What is here described as *Logic and Metaphysics* probably means the metaphysic of knowledge and existence. This is closely related to science; and so we find the history of science treated by Whewell as a part of inductive logic. Moral philosophy includes even now the natural history of morals, as well as the history of ethical theories and the metaphysic of ethics. Is Lecky's *History of Morals* to be hereafter a text-book in the moral philosophy or in the history class? Is Spencer's *Sociology* moral philosophy, or politics, or history? The same writers, with corresponding applications of metaphysical theory, have often treated the history of society in general, ethics, politics and law (including constitutional and international law), economics, and education. A professor of moral philosophy might, without objection, transform his course into one on sociology, and yet he would be treating the same subject by practically the same method, and with the same result, as the person who held the chair of history; the only difference being that the former looked more to the perfected result called society, the latter treated more of the development. Education properly finds a place in the scheme, though it is truly as practical an art as Scots law or conveyancing, and may, on that ground, be objected to by some purists. But education is also a science; it has gone through, or is going through, precisely the same transformation from art to science as law, ethics, and economics have already done. Roman law is classed as a historical subject. In England, at the present hour, Roman law takes the place of general jurisprudence, as Latin grammar takes that of universal grammar. The historical aspects of Roman law are important, but so also are the philosophical. Even on its purely dogmatic side it has already a place in the Arts degree under the name of *Antiquities*. And finally, the history of art and archæology close the present list of historical subjects. This course would give an account of the development of the idea of beauty. This subject is treated

in books of metaphysics, and belongs to philosophy as much as does ethics and the history of morals. Greek philosophy, Greek art, and Greek politics were merely different aspects of the same national life. Philosophy, therefore, seems to include all the branches of knowledge which deal with the products of man's spiritual activity, as science includes his systematised knowledge of the material universe. It is obvious, therefore, that for the preference which the Commissioners give to logic and metaphysics and moral philosophy, there is neither historical, philosophical, nor practical justification. If individual professors have vested interests, the preference might be allowed to continue while they hold their chairs, but no longer.

(2) English has been placed in the department of mental philosophy, because in some of the Universities professors of logic or moral philosophy teach rhetoric and English literature. As English has already a place among languages, it hardly seems proper to retain it in its old anomalous position, when other languages with as great right to a preference, unless we except *Greek* in the Honours course, are excluded. But the reservation of vested interests might be accomplished by a separate clause, to the effect that professors of English literature appointed before 1878, when the last Commission reported, should be entitled to have their classes reckoned also in the department of mental philosophy.

(3) The length of the course will cause inconvenience at first. Neither Sir William Hamilton's lectures on *Metaphysics* nor on *Logic* would qualify as a full course under the ordinance. It might be provided that, in the case of professors appointed before 1878, courses conducted according to their usual custom during the extended session should be qualifying courses in their special subjects. The same provision might be extended to the junior classes. There is ample and cheap means of teaching Latin, Greek, and mathematics in all the University cities, much better than the junior University classes. If the University assistants received the students' fees they could afford to teach in very small classes, and yet receive the same salaries as at present. These junior classes, therefore, may be abolished at once, where the professor was appointed after 1878. In other cases, they may be continued

till the first vacancy. In other respects it must be a matter for consideration for the University authorities whether there shall be any junior courses in any department. When the attainments of intrants are fairly high, all courses may fairly be made *Honours* courses, meeting thrice weekly. The system of dictating an elementary text-book in small daily doses as lectures should be stopped. The student should know enough of the subject to enable him to carry off a lecture with *bond-fide notes*; just as a professor delivers a lecture from *notes*. The Honours student always resents excessive attendance on formal classes, for they interfere with his private study without corresponding benefit. The ordinance of the Commissioners will thus enable the University authorities to achieve a great reform.

(4) But the Commissioners might have gone a step farther in favour of law without violating precedent. They might have made the present B.L. course qualify for M.A. All that is required is a clause to the effect that Scots law and conveyancing may be taken for two branches of philosophy. Teachers may take *education* for their M.A. Why should lawyers not be allowed to take law? Lord Stair, two centuries ago, in his *Institutes*, treated the *Law of Scotland* as a branch of general culture. A century later, Blackstone did the same for the *Law of England*. Men from the English Universities, who take B.A. in English law with a very elementary and limited examination, are received into legal bodies—such as the Faculty of Advocates—without any inquiry into their general attainments; while Scottish B.L.'s, who have passed harder examinations than the average M.A.'s, are not recognised as graduates at all. The very Universities which confer the degree of B.L. refuse to the holder privileges which they award to the holder of the inferior B.A. in Law from Oxford or Cambridge! It is to be hoped the Commissioners will remedy this glaring injustice before finally issuing their ordinance.

W. G. M.

Appointments.

MR. ALEXANDER BLAIR, Advocate (1860), Sheriff of Stirling, Dumbarton, and Clackmannan, has been appointed Sheriff of the Lothians and Peebles, in room of the late Sheriff Crichton. Mr. Blair was Advocate-Depute from 1885 to 1888, when he was appointed Sheriff of Chancery. In 1889 he was appointed to the sheriffdom which he now vacates.

MR. JOHN M'KIE LEES, Advocate (1867), one of the Sheriff-Substitutes of Lanarkshire since 1872, has been appointed Sheriff of Stirling, Dumbarton, and Clackmannan.

Obituary.

THE LATE SHERIFF CRICHTON.—Mr. James Arthur Crichton, Advocate, Sheriff of the Lothians and Peebles, died in Edinburgh on the 29th May, at the age of sixty-six. His death was not altogether unexpected, for it had been known for some time that he was seriously ill; but it followed strikingly close upon that of his aged father, and the announcement that he had passed away caused genuine sorrow in every quarter. Sheriff Crichton was greatly liked. He was the most genial and kindly of men. No one could be more utterly destitute of envy, jealousy, or self-seeking than he was. No one ever was more truly without an enemy. Mr. Crichton was a sound lawyer, with a wide and accurate knowledge of case law; and he was a conscientious and pains-taking judge.

Sheriff Crichton was admitted a member of the Faculty of Advocates in 1847. He became Advocate-Depute in November 1862, and again in 1868, with the return of his party to power. In 1870 he was appointed Sheriff of Fife; and,

while holding this office, he was chosen by the Sheriffs of Scotland to be their Convener. In 1886 he was appointed Sheriff of the Lothians and Peebles. Mr. Crichton was Vice-Dean of the Faculty of Advocates from 1876 to 1886.

The late Sheriff was never married. From boyhood upwards he continued to live with his father, and to him he was never more than a boy. He used to tell, after he had passed the age of threescore years, that if he was a little late in rising any morning, his father was still in the habit of coming to order him out of bed! Long after he was a venerable senior at the bar, and his contemporaries were senior judges, he was, in the eyes of his father, still in his 'teens. It was not unfitting that a father and son so devoted to each other as these two, should die within little more than twenty-four hours of each other, and pass in one procession to their graves.

MR. JOHN TURNBULL, of Abbey St. Bathans, Writer to the Signet, died on 20th June. Mr. Turnbull was the eldest son of Mr. George Turnbull, W.S., of Abbey St. Bathans, and was born in 1820. Educated at the High School and University of Edinburgh, he was admitted a member of the Society of Writers to the Signet in 1841, and has been actively engaged in his profession for fifty years. Mr. Turnbull was a Justice of the Peace, and a Deputy-Lieutenant of Berwickshire, and Convener of that county.

MR. HEW CRICHTON, S.S.C., died in Edinburgh on 27th May, in his ninety-eighth year.

MR. ROBERT EMSLIE, S.S.C., Edinburgh, died at Melbourne on 13th May, at the age of forty-one.

MR. PETER MILLER, Solicitor, Linlithgow, died on 26th May, in his eighty-second year. Mr. Miller was Dean of the Faculty of Procurators in his county, and held the office of senior Town-Clerk of Queensferry.

MR. DAVID BARR, Solicitor, Glasgow, senior member of the firm of Moncrieff, Barr, & Paterson, died on 29th May, in his sixty-ninth year.

The Month.

Chief-Justiceship of the Leeward Islands.—It is expected that Sir Henry Ludlow will, at an early date, resign the office of Chief-Justice of the Leeward Islands owing to ill-health. Sir Henry has held the office since 1886.



Society of Solicitors Supreme Courts.—At a stated general meeting of this Society on 3rd June, the following appointments were made for the ensuing year, viz.:—President, Mr. James S. Mack; vice-president, Mr. John Smart; Mr. R. Addison Smith; librarian, Mr. William Drummond; treasurer, Mr. John Galletly; collector of Widows' Fund, William G. Roy; assistant librarian, Mr. William B. Rennie; secretary, Mr. A. Ellison Ross. Messrs. James Rennie and J. B. M'Intosh were elected members of Council in room of members who retired by rotation.



Interim Affiliation.—"Our contemporary, *Vanity Fair*," says the *Law Times*, "presents its readers with a caricature of Lord Justice Fry, and in its letterpress says 'he became the son of Joseph Fry, of Bristol, fifty-four years ago.' Was his son was he the previous ten years?"



Legal Adviser for the Shah.—Mr. Ellis J. Griffith, Barrister-at-Law, has been appointed legal adviser to the Shah of Persia, at a salary of £2000 a year. Mr. Griffith had in consequence retired from his candidature in the Liberal interest for the representation of one of the divisions of Liverpool, and has gone to Persia.



Wife's Right of Action.—In the recent case of *Waldron v. Waldron*, United States Circuit Court, Northern District of Illinois, Bunn, J., charged the jury that "a woman

maintain an action against another woman for wrongfully or intentionally destroying the affection of her husband, or persuading, enticing, or alluring him to desert or abandon her." This adds another authority on the right side of this question.—*Albany Law Journal*.

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Gordon-Cumming v. Wilson and Others.—It were sanguine to hope for calm sense till the sensation begotten by so remarkable a trial has somewhat subsided. It is right, however, that the Lord Chief-Justice's address to the jury should not pass without comment. If Sir Edward Clarke's speech nobly maintained the best traditions of the English Bar, as the current phrase goes, it is a fact that Lord Coleridge's performance was a melancholy and flagrant violation of the best traditions of the English Bench. To say that it will not add to his reputation would mean, unfortunately, very little; for they must be few, indeed, who were not surprised to learn that his lordship's reputation has aught to lose. We should not have found fault with the summing-up on the score of partiality (if partiality it were), for many a strong and excellent judge cannot help sometimes being one-sided. But we must grieve that, in place of a masterly and judicial review of the evidence worthy of so grave an occasion, the Lord Chief-Justice should have offered a mere medley of thrice-hackneyed quotations, seasoned with indecent flippancies, and crowned with a paragraph of adulation conceived in the worst possible taste. It was undignified and unbecoming; more like a second-rate after-dinner speech than the utterance of a judge directing the deliberations of a jury.—*National Observer*.

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Herbert Spencer on Justice.—The *Athenæum* says that Mr. Herbert Spencer's new work, entitled *Justice*, is nearly through the press. It forms the fourth division of his *Principles of Ethics*, which he has executed out of its turn, as being the most important division. Parts II. and III., completing the first volume, will next be undertaken; and afterwards, if he should succeed in completing these, Parts V. and VI., which, with the part now issued, will make up the second volume.

Publication of Libel.—The case of *Pullman v. Walter Hill & Co.*, ante 373, decided the novel point that a libellous letter dictated by the writer to his clerk, and copied by him, and opened and read by a clerk of the person to whom it is addressed, in the ordinary course of business, is published to both clerks. No cases are cited, but the *Solicitors' Journal* calls attention to the case of *Kiene v. Ruff*, 1 Clarke (Iowa), cited in Odgers on Libel (and also in Townshend, and wrongly cited in Odgers as *Keene*), holding precisely the same doctrine as to the clerk of the writer. The Court held the point without much expressed consideration, merely observing, "We fail to see why there was not a complete publication," and "Wilding being procured to copy the libellous matter, was clearly an agent to whom the libellous matter was communicated." Citing *Baldwin v. Elphinstone*, 2 W. BL 1037, where the delivery of the matter to the printers of the *St. James' Chronicle* and the printing therein was of itself held to be a publication. As to the clerk of the person addressed, the decision is supported by *Delacroix v. Thevenot*, 2 Stark 63. —*Albany Law Journal*.



Betting and Lotteries.—*Caminada v. Hulton*, a case stated by justices, is a very interesting case of the law of betting and lotteries. Mr. Justice Day and Mr. Justice Lawrance have held that the publication of a handicap book with a weekly coupon "in which six races were selected and pecuniary prizes were promised" to any purchaser of a newspaper in connection with which the handicap book was issued, "who filled up the coupons with the names of six winners," was not a publication of a lottery within the Lottery Act (4 Geo. IV. c. 60), or an advertisement to procure betting within the Betting Act, 1874 (37 Vict. c. 15). That there was no offence against the Lottery Act we are quite clear; there would be far too much skill in the eye of the law required on the part of the competitors for that. But at first sight the Betting Act, 1874, seems to apply. By this Act "where any letter, circular, telegram, placard, handbill or advertisement is sent, exhibited or published (1) that any person will give information as the subject-matter of a bet or

will lay a bet for another person, (2) to induce any person to apply to a betting-office for information or advice," or (3) "inviting any person to make or take any share in or in connection with any such bet or wager," as is mentioned in the principal Act (of 1853), every person so publishing the same is liable to the penalties of the principal Act. There is some ground for saying that the competitors who filled up the coupons (which they could only buy with the newspaper) were invited by the proprietor to bet on the six horses the names of which they should write down on the coupon, the money laid on those horses by them being the sum paid on buying the newspaper and handicap book together, and the money laid against those horses being the prize promised to be paid to the person or persons who should select six winners. On the whole, however, we think that the Act of 1874 will not bear this construction. The rule is that penal Acts must be strictly construed in favour of an accused person, and this construction will not satisfy that rule.—*Law Journal*.

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Excessive Vigilance.—"The prize donkey of the decade," writes the *Albany Law Journal*, "is Policeman Maguire, of Boston, who arrested Mr. and Mrs. Noyes, who, while standing in a doorway, in the evening (rainy, we believe), waiting for a street-car, were moved to indulge in the very harmless and natural conjugal act of kissing one another; whereupon Maguire sallied forth from an opposite doorway, where he had ensconced his Dogberrian self, and because they would not 'move on,' arrested the pair, and haled them before a magistrate, who, like a sensible man, at once discharged them. We suppose Maguire considered that they were acting in a Noyesy manner, but it did not appear that it disturbed anybody but Maguire. Now, if we were in Mr. Noyes' place (and we wish we were), we would take the pretty Mrs. Noyes back to the same doorway, and kiss her again right under Maguire's nose, and thus 'aggravate' him beyond endurance. Noyes is a much more commendable fellow than Clitheroe Jackson."

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Barbed Wire.—To what extent, if any, is a barbed wire

fence legal? This is a question which must sooner or later, we should imagine, be brought before the Courts, and the recent laceration by such a fence of two of the horses of the Dorking coach has brought it prominently before the public. Considerable light is thrown upon it by the well-known cases of *Deane v. Clayton*, 7 Taunt. 489, and *Jordan v. Crump*, 8 M. & W. 782, in both of which cases the action was brought for compensation for damage to a dog by dog-spears set by the defendant to prevent dogs chasing game. In *Deane v. Clayton* the Court was, in 1817, equally divided, with the result that after most elaborate arguments no judgment at all was entered; but in *Jordan v. Crump* it was held, on demurrer, that a plea that the dog-spears were set to preserve game and to disable and kill dogs pursuing them, "of which the plaintiff had notice," was held good, and it was further held that the plea would have been good if there had been no allegation of notice. "It is true," said Baron Alderson, in delivering the judgment of the Court, "that the law in certain cases makes an exception to the right of setting instruments capable of causing deadly injuries to *human* life, where such injury will be a probable consequence of setting them" (see 24 & 25 Vict. c. 100, sec. 31, re-enacting 7 & 8 Geo. IV. c. 18); "but, with the exception of those cases, a man has the right to do what he pleases with his own land." Section 31 of 24 & 25 Vict. c. 100, enacts that "whosoever shall set any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same may destroy life or inflict grievous bodily harm upon a trespasser or other *person* coming in contact therewith, shall be guilty of a misdemeanour." Could not the rider of a horse in the hunting-field be a person within the meaning of this section? We incline to think that he could; but we are pretty sure that no Court would hold a barbed wire fence to be an engine. The general question will be found dealt with in the County Court case of *Bennett v. Blackmore* (see the *Field* for January 24, 1891), in which his Honour Judge Edge gave judgment against the owner of a barbed wire fence, following with approval the judgment of the Court of Session in the Scotch case of *The Elgin Road Trustees v. Innes*.—*Law Journal*.

Royal Witnesses.—The calling of the Prince of Wales as a witness, and the fact of his being sworn in the ordinary way, affords a striking proof that in the eye of the law all men are equal. The privileges (if any) that would attach to the Prince of Wales would not attach to him in his capacity of Prince of Wales or Heir Apparent to the Throne, but simply in his capacity of a peer of the United Kingdom, as Duke of Cornwall. It is curious to think that a peer of the realm, while sitting in judgment on a fellow-peer in cases of felony, either as a member of the House of Lords when Parliament is sitting, or as a member of the Court of the Lord High Steward when Parliament is prorogued or dissolved, can give his verdict without oath upon his honour, whereas he cannot be examined as a witness in any cause, whether civil or criminal, or in any Court of justice, whether it be an inferior Court or the House of Lords, unless he be first sworn or make the affirmation to which by statute the sanction of an oath is attached. "The respect," as Taylor, in his *Law of Evidence*, observes, "which the law shows to the honour of a peer does not extend so far as to overturn the settled maxim that *in judicio non creditur nisi juratis*." A peer was, however, permitted under the old law to answer a bill in Chancery upon his protestation of honour, and not upon his oath. This practice led to a curious mistake in an Irish case. A newspaper proprietor named Birch sued Sir William Somerville—afterwards Lord Athlumny—when Chief Secretary for Ireland, for an alleged breach of contract to pay him for articles written in the interest of the Government. The late Lord Clarendon, the Lord-Lieutenant of Ireland of the day, was subpoenaed as a witness. An attestation of honour instead of an oath was by mistake administered to him, and he was then examined and cross-examined without any objection being taken to the reception of his evidence. A motion for a new trial was made on the ground that the testimony of an unsworn witness had been received, but the Court, having ascertained that the losing party had from the first been aware of the irregularity, held that the objection came too late, and the rule was accordingly discharged (*Birch v. Somerville*, 2 Ir. L. Rep. N. S. 243).

Closely connected with the examination of Princes of the

Blood as witnesses is the possible examination of Royalty itself in a Court of justice.

In the impeachment of the Earl of Bristol, in the early part of the reign of Charles I., a curious constitutional question arose, which Lord Campbell, in his *Lives of the Chancellors*, tells us, very much perplexed the Lord Keeper, who was, curious to relate, the Lord Coventry of the day. It remains still undetermined. The Earl of Bristol, in his defence, relied upon communications which had passed between him and the King, when Prince of Wales, at Madrid, and proposed to call the King himself as a witness. The Lord Keeper gave it as his opinion that the Sovereign cannot be examined in any judicial proceeding under an oath or without an oath, as he is the fountain of justice, and, since no wrong may be imputed to him, the evidence would be without temporal sanction. On the other hand, the hardship of an innocent man being deprived of his defence by the heir to the Crown becoming king was urged, and much stress was laid on the doctrine that substantial justice ought to be paramount to all technical rules. A proposal was made, which could not be resisted, that the judges should be consulted; they, however, declared on a subsequent day that His Majesty, by his Attorney-General, had informed them that "not being able to discuss the consequence which might happen to the prejudice of his Crown from these general questions, his pleasure was that they should forbear to give an answer thereto" (2 Campbell's *Lives*, pp. 510, 511). Lord Campbell, writing in 1845, apprehends that the Sovereign, if so pleased, might be examined as a witness in any case, civil or criminal, but must be sworn, although there would be no temporal sanction to the oath. He likewise states that in the Berkeley Peerage case, before the House of Lords in 1811, there was an intention of calling George IV., then Prince Regent, and as such exercising some Royal prerogatives, as a witness; the general opinion being that he might have been examined, but not without having been sworn. It is strange to think that eighty years afterwards another stage of this Berkeley Peerage case deprived one of the parties in a case in which the Prince of Wales of the day was actually examined of the advocacy of the Attorney-General.—*Law Times*.

Damages for Dismissal from Employment.—The law relating to master and servant has many sides, and no sooner is one difficulty examined and disposed of than others appear and claim attention. Servants of the superior class, such as clerks and managers, are often engaged for a considerable period of years, and during the currency of the period many incidents may occur to prevent the fulfilment of the contract as originally contemplated. It is of great importance that one should be able to comprehend the situation of both parties in the event of a premature ending of the relationship. In considering the effect of every contract, and the questions arising, one must always look first to the language of the contract itself; and the true construction of the language (apart from force, fraud, or mistake) is the touchstone of legal right. It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions which arise incidentally or accidentally in the course of the performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as if these questions occurred between strangers. The law of carriers and of shippers abounds in these complications. And, as was stated in one of that class of cases, *Lloyd v. Guibert*, L. R. 1 Q. B. 120, a person who expressly contracts absolutely to do a thing which is not naturally impossible is not excused by the law of England for non-performance because of being prevented by the act of God or the king's enemies; though, in respect of carriers, who are exposed to considerable risks, such prevention is treated as an implied exception. When ordinary contracts of master and servant occur, and a long service is entered upon, it may happen that the master becomes bankrupt or gives up his business, or his premises are burnt down, and it is useful to know how far his liability continues thereafter. In many cases, as appears from *Ex parte Maclure*, L. R. 5 Ch. 737, an agent who has been employed by a company which is wound up has been held to have no claim in respect of commission against the company, though he will be allowed a proof for his fixed salary, if any. In 1876 a question of difficulty arose in reference to the rights of an agent employed for a

term of years, and during the term the principal sold his business. As the case reached the House of Lords, and received great consideration, the judgment closely affects the law of master and servant, and is of great authority. In *Rhodes v. Forwood*, 1 App. C. 256, Rhodes was a colliery owner in South Wales, and was anxious to place his coal in the most advantageous way on the Liverpool market. He entered into an agreement with a firm, Forwood & Paten, in Liverpool, the substance of which was that they were to become his agents for the sale of coal in Liverpool for a term of seven years. During that time Rhodes engaged that he would not employ any other agent in Liverpool to sell his coal, and they were not without his consent to sell any other people's steam coal. They were to be paid a price for their services by a percentage on the value of coal sold, and for that price they were to undertake all the expense of an office, of advertising and commending the coal to purchasers. Accordingly, the business was entered upon, and the agents incurred considerable expense in advertising. The employment continued three and a half years, when the principal sold his colliery, and hence no more coal could be sent to Liverpool on the old terms. The effect on the agents was that they lost the benefit of the expense incurred at the beginning, and they were deprived of the commission which they might have earned in the later years. The question in the circumstances was whether Rhodes, the principal, had violated his contract. In order to settle this question it was necessary to scrutinise the terms of the contract, and it was found that there was nothing express in the contract to the effect that Rhodes would send any coal, or for how long. Hence, the agents had to rely on the implied obligations which the contract might suggest. The outline of the contract was found to be merely that, so long as the agents should carry on their business at Liverpool, they should be the sole agents there; but nothing was said about coal sold elsewhere, and, on the other hand, the agents were not to sell other people's coal. Then there was a clause, "subject nevertheless to the determination of such agency in manner hereinafter mentioned." The contract then said that if, during any one year, the agents should not have sold

50,000 tons, it should be lawful for Mr. Rhodes to determine the agency at the expiration of six months from the delivery of a written notice to that effect. On the other hand, if Rhodes should not duly supply 75,000 tons in any one year, then the agents might, in like manner, determine the agency. The question thus came to be whether the principal impliedly bound himself that he would not disable himself from sending coal to Liverpool by selling his colliery to any other person. The Exchequer Chamber held that the principal was bound to find coal to send to Liverpool for seven years, and in doing so, that Court reversed the judgment of the Court of Exchequer. The House of Lords had thus to decide which of these views was right. The Lord Chancellor (Cairns) said that it certainly would have been a much wiser thing if both parties,—or, at all events, if the agents,—in place of stipulating for a mode of terminating the agreement which would take eighteen months perhaps to bring about, had stipulated for a more speedy power of terminating the agreement, and for the power of taking coal from other people as agents, supposing the coal of Mr. Rhodes was not sent to them. The House of Lords, however, said that they could not make a new or different agreement, and hence held that as there was no express contract on the subject, neither was there any implied contract, and hence there was no violation of contract by the principal. Lord Hatherley said that the parties seemed to him to have entered into a simple contract of agency, which necessarily determines when the subject-matter of the agency is gone. It was a thing the parties might have foreseen, that the agency might come to an end in that way as well as in the one way provided for. In fact, there were three or four other kinds of contingencies which might have occurred, and which were also unprovided for. What happened was, that the parties assumed the probability of a certain state of things existing, but they did not enter into a guarantee that such state of things should continue to exist. Thus five law lords reversed the judgment of three judges of the Exchequer Chamber, a fourth judge of the latter Court differing from the others.

A very recent case has occurred which again illustrates the difficulty in judges agreeing in the interpretation of this

kind of contract between principals and agents or masters and servants. In *Turner v. Goldsmith* (1891), 1 Q. B. 1, a different result to that in the last-mentioned case was arrived at by the Court of Appeal, which Court reversed the judgment of Grantham, J. The defendant (Goldsmith) who traded under the name of a company, was a shirt manufacturer, and entered into an agreement whereunder he employed the plaintiff (Turner) as his agent, canvasser and traveller. The plaintiff and defendant agreed, the former to serve and the latter to employ, on the following terms: (1) That the agency should commence on a day named in writing, should be determinable by either party at the end of five years, by three months' written notice; (2) the plaintiff should do his utmost to obtain orders and to sell, etc.; (3) the plaintiff was not to sell any shirts made by other persons than the kind manufactured by the defendants; (4) that the commission should be $3\frac{3}{4}$ per cent. on all goods sold by the plaintiff. The employment began, and continued for five years, when the defendant's factory was burned down, and the defendant did not resume business, and ceased to employ the plaintiff. The plaintiff commenced an action to recover damages for breach of contract. The jury assessed the damages at £125, but the question was reserved whether there had been any breach of contract, and Grantham, J., after consideration, entered judgment for the defendant. The plaintiff thereupon appealed.

In the Court of Appeal the previous case of *Forwood v. Forwood* was much relied upon by the defendant, but the Court pointed out a very clear distinction. In the previous case there was no absolute contract to employ for a term of five years, for there were ways of determining the contract at the end of the period, whereas here there was an express contract to employ for five years certain, and the contract could not be put an end to except at the end of five years. The Court of Appeal held that this made all the difference. It had been contended that there was nothing binding the defendant to furnish the plaintiff with samples, and hence no agreement to do what was necessary to enable the plaintiff to earn his commission. But the Court said that the answer to this argument was, that the defendant would not be employed

the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent. The Court also noticed that it was true there was nothing binding the defendant to go on manufacturing shirts; still, he bound himself to employ the plaintiff, and this the defendant of course might equally do by buying the articles in the market. The premises being burnt down and the defendant making no effort to resume business, the plaintiff was, according to the Court of Appeal, entitled to damages for breach of the contract to employ the plaintiff for five years. All the three Lords Justices agreed in this judgment, and as it is a form of contract not uncommon, the result shows the importance attached to the details which are selected for express treatment when an engagement of this kind is entered upon.

With regard to the damages recoverable for breach of the contract to hire a servant, a recent case of much practical importance may be noticed in close connection with the last cited cases, and is important to those servants of the humbler class and to apprentices. In *Maw v. Jones*, 54 J. P. 727, the plaintiff had bound himself as apprentice to the defendants for four years to learn the business of a draper. The defendants covenanted to instruct him and provide him with food and lodging during the period. It was also provided that if during the term the plaintiff showed want of interest in his work, then the defendants might cancel the deed by giving him a week's notice. The apprentice had gone out at night without leave, and was one day summarily, and without notice, dismissed on the ground that he had been guilty of frequent acts of insubordination. The apprentice sued his master for damages, and the defendants paid 40s. into Court, but justifying the dismissal. The case was tried, and the judge told the jury that though the defendants would have been justified in dismissing the plaintiff after a week's notice, yet the jury were not bound to limit the damages to the value of one week's services. The jury gave a verdict for £21 damages, but without estimating the value of one week's services, which probably would not exceed 40s. The jury also found that the plaintiff had not been guilty of any misconduct, and that no grounds existed for dismissing the

plaintiff without notice, though there were some grounds for dismissing him after a week's notice. This ruling of the judge came before a Divisional Court, and the Court held that the view of the judge was correct, that inasmuch as the defendants had chosen to dismiss the apprentice without notice wrongfully, the plaintiff was entitled to recover all the damage flowing naturally from the breach, and the difficulty which a discharged apprentice might have in obtaining employment elsewhere. The Court therefore held that the award was not an unfair measure of damages to be recovered in the circumstances.—*Justice of the Peace.*



The Scientific Detection of Crime.—Of late years science has aided us to such an extent that the escape of a criminal to-day is made a much less easy matter than it was half a century ago. Chemistry, the microscope and spectroscopy are generally unerring detectives, and supply the authorities in a wonderful way with damning proofs for conviction. So accurately do they perform their work that the merest traces of the organic fluids are discovered; and the spectroscopy supplied even with an almost inappreciable amount of poison or blood, will furnish sufficient evidence to hang a guilty man. It would be strange if the advancement were all on one side, and it is not. A comparison of the criminal records of twenty years ago and those of to-day will show frequently that poisons which are the most difficult of detection and of the most recent discovery are chosen by poisoners, and that alterations in personal appearance are effected by appropriate chemical reagents, suggesting that the professional criminal has generally some knowledge of the advance of chemistry. To consider the subject most systematically, it is necessary that we should bear two points in view,—first, the apprehension of the criminal; and, secondly, his conviction. Certain peculiarities often render identification a comparatively easy matter, but when these marks are obliterated, and the appearance of the individual is changed to a great extent, the affair becomes more serious for the detectives. As a general thing, they are furnished only with a photograph, and with this they are to pick out of hundreds of criminals the one they are in search of.

of. A very accurate description also accompanies the picture. So easy is it for the criminal to alter his entire appearance that in a short time a complete metamorphosis is effected. Criminals have gone so far as to cut off a finger, or have pulled out several front teeth, to conceal their identity. Of all disguises the most effectual are produced by the use of washes and dyes to alter the colour of the hair. Some years ago this method of disguise was considered out of the question, and it was not till Orfila, the renowned chemist, testified to the contrary, that it was believed practicable. The first case of this kind, where identity was doubted, occurred in Paris, where a murder had been committed. One witness swore that he had seen the suspected person at ten o'clock in the morning at Paris, and affirmed that his hair was black; while others testified that they had seen him in *Versailles*, with *fair* hair at five or six o'clock of the same evening. The man's hair was naturally jet black, and it does not appear that he wore a wig. The question in consequence proposed to Orfila by the law authorities was whether black hair could be dyed fair. One of the first hairdressers of Paris, who was consulted, declared that it was impossible; but Orfila stated that it was not only possible, but that it had been done twenty-six years before by Vauquelin, by means of chlorine. Since that time it is commonly done, and, in the greater number of instances, the hair of the criminal is red, sandy, or brown, and it is dyed black by preparations of silver, lead, bismuth, or sulphur, first washing the hair with some alkali. To bleach it, chlorine water or peroxide of hydrogen is chosen. In spite of these ingenious measures, however, the chemical expert is ahead of them; for at his disposal he has reagents to detect the metal, which is readily found, or by close inspection he can, at the end of a day or two, see the difference in colour between the dyed portion and the natural hair. In speaking of the obliteration of certain scars and India-ink marks, it is stated, in opposition to the popular idea, that these stainings are not indelible. Caspar and Hutin have devoted themselves to the investigation of the subject, and found in many cases that scars could be removed. In regard to India-ink and other pigments which have been pricked into the skin, we have an admirable article by Tardieu in

the *Annales d'Hygiène Publique*, vol. iii. p. 171. One prisoner seen by him removed the India-ink tattooing very rapidly by a paste containing acetic acid and other substances. In a few days a crumb dropped from the skin, leaving a clean surface. Questions of identity based upon striking peculiarities of the individual are often cleared up by the merest chance; for example, a man was found murdered, and from the direction of the knife-wound it was strongly suggested that the murderer was left-handed. After vain attempts to solve the difficulty, he was told to hold up his right hand; thrown off his guard, he immediately held up his *left*. The slightest trifles will be seized upon by the watchful detective, and often secure conviction. No better example can be given than that cited by Best. The criminal was detected by a certain malformation of his teeth. A robbery had been committed, and in the morning some partially eaten fruit was found upon the table in one of the rooms. The attention of the police was called to peculiar teeth-marks upon the apples, indicating the absence of two front teeth from those of the eater. An individual with this dental defect had been seen lurking about the vicinity a few days before. When taxed with the crime, he promptly confessed it. So, too, are the footprints tell-tale witnesses in many cases, though this proof is not so valuable as it might be. A slipper or boot may often make a print which is really much larger than the foot, and which it does not subsequently fit. M. Hougolin has devoted himself to this branch of the study, and devised a plan which enables him to take impressions of feet in the soil for comparison with those of the suspected criminals. He raises the temperature of the impressed ground to 212° by placing over it a brazier of live charcoal. He then dusts pulverised stearine into the impressions, which, when cold, is removed, and he is enabled to preserve an exact mould of the footprint. A plaster-cast can afterwards be made. Chemistry comes to our aid in many ways in the detection of crime. On several occasions, bodies have been so burnt or charred as to defy identification, and analysis is the only thing to fix the identity. A set of false teeth or even a button has escaped destruction, and has been secured to convict the criminal. In one instance, the process of combustion had

been so thorough that nothing was found except a small vitreous substance which, when examined by chemical experts, proved to be the mineral part of a set of false teeth. A mysterious murder was committed in a small French town a few years ago. The victim was the *curé*, and he was found dead with a ball through his head, and another lodged in his brain. It was extracted and found to be cast from pewter. This was the only clue the police possessed. After a month or so, suspicion fell upon a shoemaker, who had borne ill-will toward the *curé*. On examining his house, a pistol and three bullets were found. Two chambers of the pistol had been discharged, and the balls obtained resembled that extracted from the brain of the murdered man. The shoemaker was arrested and tried, and the bullets presented, but they were not considered sufficient to convict him, they being the only evidence. He would have escaped had it not been for a young chemist who begged to be allowed to make an analysis. He received and weighed the balls, and found all weighed the same, although that extracted from the head of the *curé* was somewhat battered out of shape. Chemical analysis demonstrated that they were exactly alike in chemical constitution,—even when subjected to the most delicate analysis,—and that they differed markedly from twenty or thirty other pieces of pewter. The conclusion arrived at was that no two specimens of pewter are alike, as this metal is not made in the same way at different times, the proportion of its ingredients varying considerably.

Chemistry undoubtedly helps us more effectually in the examination for poisons than in any other way. We may imagine how difficult the task must be when we take into account the small amount of some poisons that is required to destroy life. Taylor says: "This may be tested by the smallest fatal doses of some well-known substances. In one well-observed case, two grains of arsenic, given over a period of five days, destroyed the life of an adult. Supposing the whole of this quantity had entered into and remained in the blood, it would have formed only the ninety-eight thousandth part by weight of that liquid; but as elimination and deposition go on simultaneously, the proportion in the blood at any given time must have been much less than this; and yet there

can be no doubt that the poison destroyed life by its action on the blood!" Of course, analysis of this fluid is a difficult and delicate matter, and we are occasionally obliged to resort to the spectroscope. Preyer, of Jena, has done more with this instrument than almost any one else. *Prussic acid* spectra present two well-marked absorption bands, which in size and position differ but little from those of normal blood. *Oxalic acid* gives one band in the orange on the left of the sodium line, and a complete absorption of the violet, indigo, blue, green, and most of the red rays. Some poisons, however, are eliminated very quickly from the system, and we are unable to detect their presence. Among these are the organic poisons, which often defy detection. The colour of the blood is sometimes markedly changed by poisons, becoming either purple, black, etc. Many notable cases figure in the annals of medical jurisprudence, demonstrating the difficulty of making distinction between accidental and intentional poisoning. With Wilkie Collins's admirable theory of the "Law and the Lady" in view, we call to mind the really ingeniously constructed poisoning case. This fictitious case, like many real ones, suggests the fact that often the use of arsenic as a beautifier by vain women, or as a remedy by patients with cutaneous affections, sometimes produces the death of the user, and occasionally suggests criminal action on the part of relatives or friends. An example is quoted by Taylor: "A girl, nine years old, died after a short illness, with obscure symptoms suggesting criminal poisoning. It afterwards transpired that her stepmother, who was suspected, had used it in an ointment that had been applied to the scalp. *Post-mortem* examination revealed traces of poison in the internal organs; and the question arose, whether arsenic had been administered in the food intentionally, the stepmother being known to have maltreated the child. As death occurred at the end of nine days,—a long time,—and as the presence of arsenic in the stomach and intestines was simply the result of absorption and preparatory elimination, the woman was acquitted.

When we devote ourselves to the examination of blood found on the body of the suspected person, the furniture of the room, or the textile fabric, the microscope is of invaluable

service. We have several points to consider, and various questions of interest arise:—1. Is the substance found blood, and is it human blood? 2. Was it accidentally deposited upon the person or not? This first piece of information is often difficult to obtain, as there are many things which closely resemble blood,—among these the iron salts, and various dyes. We have to be very careful, in removing stains from knife-blades, to avoid removing rust as well. After we dispose of these doubts, and when we decide the spot to be blood, we have to determine whether it is human blood or not. There has been much discussion in regard to this matter, and though some writers say that there is marked difference between the size of the blood-corpuscles of man and the other mammalia, it has been the general opinion of able investigators that there is none.

There are certain grand distinctions, however, where there is an absolute certainty in telling whether the blood is from mammalia, birds, fish, or reptiles. The corpuscles of the three latter are all elliptical, while the former are circular. It occasionally happens that the criminal becomes caught by his own attempts to explain away the appearance of blood upon his clothing. A man who was suspected of murder was arrested, and, when questioned in regard to some bloody spots upon his coat, attempted to account for them by saying that he had been cleaning fish. The microscope revealed the fact that the corpuscles were round and not oval. All blood-corpuscles become smaller in dried blood, and this should be taken into account when an examination is made. This question of difference in the size of the corpuscles has been such a perplexing one that various other tests have been thought of. Numerous German investigators have attempted to solve the problem, and have advanced the theory that a certain colouring substance of blood, *hæmoglobine*, from different animals, will crystallise in a different way. This test is not so exact as it was originally thought to be, and we are again in want of a new plan. An infallible test, however, is obtained by the spectroscope, that most valuable of instruments. It is competent to detect the *smallest* trace of blood, even after clothing has been washed. Sorby believes that even the one-thousandth part of a grain of blood can be

recognised. Surely, with such an instrument as this at our disposal, the chances for the suspected person are very small. With the new discoveries that are being made every day, and the valuable agents already in our hands, the statistics of crime and the certainty of arrest will be greatly increased in the future.—*Appleton's Journal*.



The Escape of the "Etata."—The escape of this steamer from San Diego, California, is liable to lead to an international complication between our Government and the Republic of Chili, similar to that which arose between our Government and Great Britain on account of the escape of the Confederate cruiser *Alabama*, unless it turn out, as is by no means improbable, that the insurgents shall be successful in the struggle which they are making against the established Government in Chili. The *Etata* was an insurgent steamer which had run into the harbour of San Diego, and had there taken aboard a cargo of arms and other contraband of war. Our authorities were informed of the character of the vessel, and of the character of the goods she was taking on board, in time to arrest her through a United States marshal, who put his deputy on board. But, of course, a deputy United States marshal could not detain a man-of-war in case she should choose to sail; and it turned out that the *Etata* had on board a concealed battery of guns, with a sufficient crew to work the same, which had been probably transferred to her from the Chilian insurgent steamer *Esmeralda*. The *Etata*, in the night, put the deputy ashore, steamed out of the harbour, and made her escape. Our Government ordered the steamer *Charleston*, which was at that time in another port, to pursue the *Etata*, and at the time of this writing the result of the pursuit has not been determined. If the *Etata* makes good her escape, and the Balmaceda party succeed in suppressing the insurrection, Chili will probably demand indemnity from our Government, and then the question will be whether our Government used due diligence in detaining the insurgent steamer. The case will be much stronger in our favour than was the case of the *Alabama* in favour of Great Britain. There, the British authorities were fully and repeatedly notified that a

steamer which was being built in one of the English dock-yards was being built as a man-of-war for the insurgents, and yet in total disregard of this notification and of the obligations of international law it allowed the steamer to put out to sea; and for that, after a long diplomatic turmoil ending in the Geneva arbitration, it paid us damages to the extent of fifteen millions of dollars. It deserves a passing observation that the war in Chili is being prosecuted with the most unexampled atrocity and brutality. Battles take the form of massacres. All the officers captured by either party are shot. This war is only paralleled by the infamous treatment which the Chilians visited upon their weaker sister Republic of Peru, the very permission of which was a disgrace to the United States, who looked on and permitted it. The Chilians are now visiting the same atrocities upon each other. Their acts in this war put them outside the pale of civilisation, and into a category which disgraces the name of Turk or Arab.—*American Law Review*.

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Present-Day Jurymen.—The jurymen in the *Walpole* case were bold enough to negotiate with the solicitors about remuneration. This is reprehensible to the last degree. No communication whatever ought to take place between jurymen and the parties or solicitors whilst the case is pending. The agreement come to between the parties concerning the increased fees to jurymen is always a strictly private matter, the concession appearing to come from both; whereas communication may reveal a disinclination on the part of one. Jurymen in the present day want keeping in order.—*Law Times*.

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Cruelty to Animals.—The decision in *Commonwealth v. Lewis*, given in 12 Crim. L. Mag. 385, note, was, on February 23, 1891, reversed by the Supreme Court of Pennsylvania. The conviction was based upon a special verdict finding that defendant had engaged in shooting pigeons liberated from a trap, at a shooting-match instituted by a club for a test of skill in marksmanship, the wounded birds being killed as soon as possible after discovery, and all the birds killed being sold for food. The Chief-Justice, delivering the opinion of

the Court, holds (see *Commonwealth v. Lewis*, 48 Leg. Int. 96) that there is no legal difference between shooting birds in this way and shooting them when found at large in the woods, unless needless cruelty is practised; and the latter method being lawful, though the marksmanship be bad, the former method is also lawful under the same conditions. "A distinction," he says in the latter part of the opinion, "was pressed upon the argument between the case of a captive bird and one at large in the woods. In the latter instance, there is a necessity to shoot it in order to capture it for food or other lawful purpose, and if wounding results, it is an unavoidable incident, while in the case of a captive bird no necessity exists for putting it to death in this way. Some force may be conceded to this as an abstract proposition, but we do not see its application to the facts of this case. The right to kill the pigeon was and must be conceded, and there is no finding of the jury that its suffering was greater because of the manner of its death than if it had been killed in some other way. This is a scientific question which I do not feel myself competent to pass upon. Nor do I think the average juryman is any better qualified to do so. It may be that science in the future will discover the method of killing a pigeon with the least possible pain. So far as other animals are concerned, it is perhaps an open question; the attempt of well-meaning humanitarians in a sister State to reduce the suffering of condemned criminals by putting them to death by electricity instead of by hanging, has produced a long controversy, which can hardly be regarded as settled. An attempt has been made, so far unsuccessfully, to show that it is unconstitutional because of its cruelty."—*Criminal Law Magazine*.

Reviews.

The English Constitution. By EMILE BOUTMY. With an Introduction by Sir Frederick Pollock, Bart. London: Macmillan & Co. 1891.

THE late Bishop Selwyn once naïvely remarked to a somewhat self-complacent candidate for Orders, who proudly

pulled out for inspection a trial sermon on the text, "I have declared unto you the whole counsel of God," "What; all that in one sermon!" A similar remark might be made with reference to this volume on the English Constitution. The writer aims at too much. No doubt his study of our political history far exceeds in its range that of most foreigners; but he tries to look at our Constitution from too many sides at once. The views of one so conversant not only with Hallam and Stubbs, but also with present-day politics,—and even with the authorised programme of the "Free Land League,"—could not fail to be valuable and interesting, if fully and clearly set forth. But the attempt to give a sketch of the growth of the Constitution, a description of its component parts, a history of economic changes, an account of the progress of reform, a criticism of the past, a survey of the present, and a forecast of the future, within a little more than two hundred pages, is an undertaking beyond even M. Boutmy, although fortified by "a careful study of the best authorities," and possessed, in the opinion of Professor Sir Frederick Pollock, of "a mind singularly free from prejudice."

There is throughout a want of definite and connected information. Considerable previous knowledge of the subject is presupposed, and we are supplied with a running commentary on the Constitution rather than with a systematic endeavour to explain what that Constitution is. We fail to see for what class of readers the volume can be intended. It lacks the details necessary, if intended as a handbook for students; and it lacks thoroughness of treatment of the different situations reviewed, if intended as "a study." Its professed aim is to point out the chief conclusions the author has reached, but it would have been better if his premises had been more fully considered.

The chapters upon "The Country Gentlemen," "The Yeomen," and "The Manufacturing Period—the two Nations," deal with subjects not usually regarded as parts of the Constitution, and are calculated to suggest fresh lines for thought and reflection; but they are spoilt by their "scrappiness." Perhaps one of the most interesting points touched upon, and one with far-reaching consequences, is the manner in which the representation of the burgesses or urban classes

in the Lower Chamber was speedily leavened by the presence of the knights or rural gentry, and became entirely lay owing to the desertion of the parochial clergy; while the bishops, abbots, and priors formed an important element in the Upper Chamber, but only in virtue of their secular titles.

A few of the writer's individual opinions may be indicated. He refuses to see before the Norman Conquest anything but "deep-seated tendencies." He thinks the constitutional and parliamentary system had its origin in historical rather than in purely ethnical sources, and that it was "rather the outcome of the needs which circumstances had created than an inheritance handed down from the period of the Saxon Conquest." He holds that "those five hundred years, viz. the period which embraces the eleventh and fourteenth centuries, witnessed, so to speak, the unbroken development of a vigorous frame towards that solidity of structure which marks the attainment of manhood." He insists that the feudal nobility came to an end with the Wars of the Roses, and that the present large estates (*latifundia* as he calls them) were the creation of the upstart recruits of the peerage in last century; while he finds in the economic and political changes from 1760 to 1832 a revolution peaceful but more complete than England had ever before witnessed. As he approaches recent times the disinterested intelligent foreigner somewhat disappears, and the student of the *Daily News* comes more prominently to the front. The self-seeking of the oligarchy, the greed of the landowners, and the incompetency and tyranny of the justices of the peace, are set forth in a manner analogous to that in which landlords and resident magistrates in Ireland are wont to be described by the Radical press. Yet he admits that "without the existence of the English oligarchy of the eighteenth century, in whose shade it grew up and flourished, that best type of free government [the present parliamentary system] would never have come into being, and would have remained unknown to the world." He closes by prophesying that England's "ancient spirit must needs disappear with the county aristocracy, that healthy and vigorous frame which formerly sheltered it, and a new life must quicken the freshly-moulded clay of the English democracy."

We are glad to see a foreigner showing such an intelligent

interest in our Constitution. We appreciate his remarks and criticisms upon those less noticed topics to which he has adverted, and we trust he will soon elaborate them in a fuller and more satisfactory manner than he has seen fit to adopt in the outlines before us.

A Handbook of the Parochial Ecclesiastical Law of Scotland.

By WILLIAM GEORGE BLACK, Member of the Faculty of Procurators, Glasgow; Clerk to the Heritors of Govan. Second Edition, revised and enlarged. Edinburgh: Green & Sons. 1891.

It speaks to the usefulness and popularity of Mr. Black's book that it has been found necessary to issue a second edition within less than four years of the appearance of the first. The work deserves its success. Its moderate size and its method of treatment render it a convenient manual for those who have to deal with these parochial matters; and we can recommend it as reliable as well. In preparing this new edition the author has revised the work and added considerably to the text. We notice that Mr. Black is engaged in the preparation of a companion work on the Parochial Law of Scotland other than ecclesiastical.

English Decisions.

MAY—JUNE.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

COPYRIGHT.—Licence—Assignment of Copyright—Infringement—Copyright Act 1862, secs. 3, 6.—In April 1890, A., the owner of the copyright in a picture, sent a photograph of it to the defendant, suggesting that he should publish it in a paper of which he was the proprietor. In May 1890 A. assigned the copyright to the plaintiff, who duly registered himself in the copyright register at Stationers' Hall as the proprietor of the copyright. In August the defendant published his paper containing an engraving of A.'s picture. The plaintiff, who had no notice of the licence to the defendant at the time when he acquired the copyright, thereupon brought the present action for infringement of his copyright. On behalf of the defendant it was contended that the licence from A. operated to enable the

defendant to publish, and protected him as being a licence within the Copyright Act 1862. *Held* (by Mr. Justice Williams) that the licence was not equivalent to a partial assignment, and that the plaintiff took his assignment wholly unaffected by the previous licence.—*London Printing and Publishing Company v. Cox*, High Ct., Ch. Div., 13 May.

LIGHT.—*Grant of land for erection of building—Windows overlooking land of grantor—Implied grant.*—In 1875 land was conveyed by W., owner of the adjoining land, to certain persons acting for a religious body which was desirous of erecting a chapel, and by the deed of conveyance it was declared that the grantees should hold the land upon trust to erect a chapel thereon in such manner as the grantees should, with the sanction of the religious body, deem necessary or expedient, and to permit the same to be used for religious purposes; and the grantees contracted with the vendor that all lights and windows in the chapel overlooking the other adjoining land of the vendor should be of fluted or ground glass. In February 1878 the chapel trustees began to build a chapel, with windows looking out upon the adjoining land of W. In November 1878 W. agreed to sell this adjoining land, and in May 1890 the purchasers commenced to build thereon so as to obstruct the chapel windows. The action was accordingly brought against them by the chapel trustees for an injunction. *Held* (by Mr. Justice Kekewich) that, it being in the contemplation of the parties to the deed of 1875 that a building would be erected with windows overlooking the adjoining land of the grantor, there was an implied obligation on the part of the grantor and his assigns not to obstruct such windows, and that the injunction must be granted.—*Bailey v. Icke*, High Ct., Ch. Div., 13 May.

LICENSING.—*Beerhouse—Renewal of licence—Refusal by Licensing Justices to renew—Power of Quarter Sessions to re-hear case—Wine and Beerhouse Act 1869, sec. 8.*—This was an appeal on a case stated by the Court of Quarter Sessions for the county of Kent. The appellant (Whiffen) was the tenant of a licensed beerhouse, which had been licensed as a beerhouse prior to and continuously since May 1, 1869. Bligh was the owner of this house. August 25, 1890, was the day appointed for the annual licensing meeting, and prior to that date no notice of objection to the renewal of the licence was served on Whiffen, and he did not attend on that day. At this meeting the justices directed the police superintendent to serve on Whiffen a notice of objection to the renewal. Notice of objection was accordingly served on September 12, 1890, by the superintendent, stating that, at the adjourned meeting to be held on September 22, the renewal of his licence would be opposed on the following grounds:—(1) That persons have been found drunk and disorderly upon the licensed premises; (2) that persons of bad character do frequent the premises. Whiffen was present at this meeting, but he was not asked to and did not produce any evidence of good character before the justices. After hear-

ing evidence, the justices refused to renew to Whiffen, stating the ground to be that he had not produced satisfactory evidence of good character. The ground, therefore, on which the justices refused to renew the licence was not one of the grounds mentioned in the notice of objection served upon him. Whiffen appealed to the Quarter Sessions, and the Court there held, that even if the justices had wrongly refused to renew the licence, the Court of Quarter Sessions had jurisdiction to re-hear the case. They accordingly re-heard the case, and refused to renew the licence on the ground that the house was frequented by persons of bad character, with regard to which due notice was given. The question now was, whether the Court of Quarter Sessions had power to re-hear the case, and refuse the renewal on a different ground to that on which the licensing justices had acted, or whether the Court was not confined to saying whether the Court below were right or wrong in refusing on the ground given. For the appellants it was now contended that the licensing justices had no power to refuse the renewal on the ground alleged, as no notice of the same had been served on the appellant, and that, as the licensing justices were wrong in their refusal to renew, the Quarter Sessions were bound to renew the licence. *Held* (by Mr. Justice Carr and Mr. Justice Charles) that, even assuming that the licensing justices had no power to refuse the renewal on the ground they did, the Court of Quarter Sessions had power to refuse the renewal on the ground they did, as such ground of objection was contained in the notice of objection.—*Whiffen and Another v. Bligh and Others, Justices, High Ct., Q. B. Div., 28 May.*

MINOR. — *Marriage settlement—Repudiation—Infants' Relief Act 1874 (37 & 38 Vict. c. 62).*—By a marriage settlement of two minors, dated October 16, 1883, after a recital as to a life policy for £20,000 effected by the father on the life of his son, in consideration of the marriage, the father covenanted to pay to the trustees of the settlement a yearly sum of £1500 during the life of the son's intended wife; and it was by the settlement agreed that the trustees should pay such yearly sum of £1500 to the son during his life, until he should become bankrupt, or assign or charge the same, or until some other event should happen whereby the said yearly sum, if belonging absolutely to him, would become vested in or payable to some other person; and in the event of such failure or determination, the annuity was to be applied by the trustees for the benefit of the son and his wife and their issue. It was also further agreed that, if the son then was, or if he or the trustee should become, entitled to any property under any settlement or appointment, or will of the father, unless it was otherwise directed, such property should be vested in the trustees upon the trusts declared in the settlement with regard to the policy moneys, and should be applicable by way of satisfaction *pro tanto*, at the rate of 4 per cent. per annum, of the yearly sum of £1500 so covenanted to be paid. This settlement was approved by the Chancery

Division on behalf of the wife, but not on behalf of the husband. In November 1883 the husband attained twenty-one. In November 1878 the father made his will, giving all his realty and personalty to his two sons, and died in May 1887. On July 31, 1888, the son repudiated the settlement. The annuity of £1500, which had been duly paid up to this time, was then discontinued. Three instalments had been paid since the father's death. There were various incumbrances upon the son's interest under his father's will, and also on the annuity. The trustees of the settlement brought an action to determine whether the son had confirmed the settlement, or whether he could repudiate it, and had done so within a reasonable time; and also whether compensation should be made out of the annuity moneys to those who had been disappointed by the repudiation. *Held* (by Mr. Justice Rimer)—(1) that the son was not bound by the settlement, inasmuch as it was a voidable contract, and he had repudiated it within a reasonable time after his father's death; (2) that the annuity moneys received by the son since the father's death, and all subsequent moneys which would have been payable to him if he had not repudiated the settlement, must be applied in compensating the persons disappointed by such repudiation; (3) that the trustees had an equity to be repaid the three instalments out of the son's share in the father's residuary estate in priority to the claims of the incumbrancers; (4) that the repudiation and acts of the son had determined his interest in the annuity as from his father's death.—*Carter v. Silber*, High Ct., Ch. Div., 29 May.

INTERNATIONAL LAW.—*Embassy attaché—Immunity.*—In May 1891 a receiving order was made against a debtor who was a British subject, and who had carried on business in this country down to July 1890, and had then ceased to do so. He was previously Consul-General for Persia. In January 1890 he was appointed an honorary *attaché* of the Persian Embassy, and his name was sent in to the Foreign Office as a member of the Ambassador's household. There had not, however, been any recognition of this appointment by the British Government. The debtor pleaded that he was privileged against civil process as a member of the Persian Embassy. *Held* (by the Master of the Rolls, and Lords Justices Lopes and Kay) that the appointment as *attaché* had been made by the Persian Ambassador inadvertently, and had been obtained only for the purpose of protection against creditors; and that, therefore, the debtor was not entitled to the privileges of the Embassy.—*Re Cloete*: *Ex parte Cloete*, Ct. of App., 1 June.

COMPANY.—*Liquidation—Payments out of capital—Claim by liquidator for recovery—Laches—Stale demand.*—The directors of a company, which was formed in 1868, made half-yearly payments of interest or dividend at the rate of £5 per cent. per annum on the amount of the shares, although the company never earned any profit, nor was any profit and loss account ever made out. The half-yearly payments were begun in June 1869, and were continued until July

1878, when they were discontinued on the representation of the Board of Trade that they were being made out of capital. The company was ordered to be wound-up in March 1886. In 1890 the liquidator brought an action against the representatives of the two directors who had made the payments, and who had since died, to recover the amounts improperly paid by them. The claim against one director was compromised with the sanction of the Court, and the action proceeded against the other. It was contended on his behalf that there had been too long a delay in bringing the action, and that the claim was a "stale demand." *Held* (by Mr. Justice North) that the claim must succeed; that it was not barred by statute; that there was nothing to show that the defence was prejudiced by the delay; and that the creditors ought not to lose their rights on account of the liquidator's delay, as the defendant had not been prejudiced by it.—*Re Sharpe: Re Bennett: Masonic and General Life Assurance Company, Limited, and its Liquidator v. Sharpe and Others*, High Ct., Ch. Div., 2 June.

MARRIED WOMAN.—*Separate estate—Capacity to contract—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), sec. 1, sub-secs. 2, 3, 4.*—The plaintiff sued the defendant, who was a married woman, upon a covenant in a mortgage deed which she had executed during her coverture. At the date of the execution of the deed, the only separate estate, free from any restraint on alienation or anticipation, which the defendant possessed amounted to about £4. There was no evidence that the parties had entered into the contract in respect of the £4. *Held* (by the Master of the Rolls and Lords Justices Lopes and Kay) that there was no presumption of law that the contract was entered into with respect to, and to bind, such a small sum of money, and that the contract was not binding.—*Braunstein v. Lewis*, Ct. of App., 2 June.

PRESUMPTION OF DEATH.—*Policies of life assurance.*—K., master of the ship *M.*, left San Francisco on August 6, 1890, for Queens-town. There was a cyclone on the 19th of that month. Neither the *M.* nor any one on board of her had ever since been seen. On August 22, some wreckage was picked up, which was subsequently identified by the owner as part of the cabin fittings of the *M.* The underwriters of the vessel had since paid as a total loss. K. left a will bearing date June 20, 1874, by which he appointed his wife sole executrix and universal legatee. The estate was said to be of the value of £875, of which £330 was due upon life policies of the deceased. The debts were only £30. Upon motion by the widow, as executrix, for probate, and for leave to swear that her husband died on or since August 8, 1890: *Held* (by Mr. Justice Jeune) that, before the application could be decided upon, notice must be given to the life assurance company.—*In the Goods of J. H. Kirkbride, deceased*, High Ct., P. & D. Div., 2 June.

LEASE.—*Covenant not to exercise or carry on any noisome, dangerous, or offensive trade—Sub-lease.*—The lease of a tenement contained a provision that the lessee, his executors, administrators, or assigns,

should not during the currency thereof, without the consent in writing of the lessor, for each particular purpose first had and obtained, carry on or permit to be carried on in the tenement, the trades or businesses therein specifically mentioned, or any noisome or dangerous or offensive trade or business whatsoever. The lease and goodwill of the property were purchased by G. W. H., and he carried on business there. The house was used ostensibly as an oyster bar and dining and supper rooms, but the evidence showed that the real purpose for which the house was used was that of a brothel; and a breach of the covenant contained in the indenture of lease was clearly proved to have been committed. The plaintiffs had purchased the reversion of the fee simple of the premises in question, and were also owners of adjoining premises. They accordingly moved for an injunction to restrain G. E. H. (the father of G. W. H.) and G. W. H. from committing a breach of the covenant above mentioned. G. E. H. contended that he was in no way responsible under the covenant. He denied that the premises were his property, or that he had anything to do with the management thereof. He alleged that his son G. W. H. had, since his purchase of the premises, carried on the business thereof strictly on his own account and independently of any control or management on the part of G. E. H. There was, however, evidence to show that, notwithstanding the repudiation of G. E. H. of his having an interest in the conduct of the house, he was frequently there, and took a considerable part in the management of the trade of a brothel actually carried on there. Mr. Justice Kekewich granted an interim injunction restraining both G. E. H. and G. W. H. from using or permitting the premises to be used as a brothel or disorderly house, or from otherwise doing, causing, permitting, or suffering thereon anything which might grow to the annoyance, damage, injury, or prejudice, or inconvenience of the premises comprised in the indenture of lease, or the adjoining property of the plaintiffs or the occupiers thereof. G. E. H. appealed. *Held* (by Lords Justices Lindley, Brown, and Fry) that, although the exact business relation that existed between G. E. H. and G. W. H. was not clearly established, yet there was sufficient evidence to show that G. E. H. had considerably more to do with the business than he would have the Court believe; and that if G. E. H. was not actually a tenant at will, or with some other interest in the premises, he was there managing the business, and carrying it on with notice of the covenant in the lease; that, without treating G. E. H. as equitable owner, he was in occupation, and that was enough to affect him without notice; therefore, that the interim injunction was properly granted against G. E. H. as well as G. W. H.—*Mander v. Falcke*, Ct. of App. 3 June.

COMPANY.—Shares—Transfer—No title—Issue of certificate to transferee—Refusal to register—Damages.—P. was the registered owner of a thousand shares in the defendant company, and he had the usual certificate under the seal of the company certifying him

to be so. This certificate he deposited with the plaintiff, together with a transfer, undated and unsigned by the plaintiff, in December 1888, as security for advances. In May 1889 the transfer was executed by the plaintiff, and was dated the 13th February 1889. The transfer was lodged with the company, together with the certificate, for registration, and in July a certificate was issued to the plaintiff certifying him to be the owner of the thousand shares, but he was never registered. In August 1889 P. instructed the plaintiff to sell the shares, and accordingly they were sold by the plaintiff for £426 to several purchasers; the certificate and transfers were sent to the company, who certified the transfers, which were then given to the purchasers, who thereupon paid the price to the plaintiff. At that time P. owed the plaintiff £193 for advances, which the plaintiff retained out of the £426; £110 was paid to P.; and £123 was kept by the plaintiff, and shortly after applied in payment of money due from P. to him. In October 1889 the defendant company refused to accept the transfers or to register the purchasers of the shares, and the plaintiff was then compelled to purchase a thousand shares for his purchasers for £717. It appeared that P. had transferred his thousand shares to some one else before he deposited his certificate with the plaintiff. The plaintiff sued the defendant company to recover the £717 as damages for refusing to accept his transferees, and to register them as owners of the shares, and Mr. Burn Pollock gave judgment for him for the whole sum. *Held* (by the Master of the Rolls and Lords Justices Lopes and Kay) that the defendants were estopped from denying that the plaintiff was the owner of the shares, and that the proper measure of damages was the full amount expended in buying other shares in the market. — *Tomkinson v. Balkis Consolidated Company*, Ct. of App., 4 June.

Sheriff Court Reports.

SHERIFF COURT OF LANARKSHIRE AT GLASGOW.

M'LENNAN v. J. AND A. ALLAN AND OTHERS.

Vexatious litigation—Powers of Sheriff Courts.—Sheriff-Principal Berry has just given his decision in the Glasgow Sheriff Court in a case of much importance to litigants, as it is the first case of the kind which has come up in a Scottish Court. The following note by the Sheriff-Principal fully explains the case:—"By his interlocutor of 3rd March 1891, closing the record in this action, the Sheriff-Substitute made avizandum to the Sheriff, with the minute for defenders and answers thereto by the pursuer on the

certified copy petition. The pursuer is William M'Lennan, of 52 St. James Street, Paisley Road, Glasgow, and the defenders are the firm of James & Alexander Allan, shipowners, Glasgow; Alexander Allan, the only known partner, and John Macfarlane and John W. Murray, both in the employment of the firm. The craving in the petition is for a sum of £1000 with expenses, and the claim is rested on pleas of damage said to have been sustained by the pursuer through 'false and fraudulent statements made by the defenders John Macfarlane and John W. Murray, and instructed by and with the full knowledge and consent of the defenders James & Alexander Allan,' and through the last-mentioned defenders' 'breach of engagement, and the wilful and corrupt perjury of the defenders John Macfarlane and John W. Murray.' The minute lodged for the defenders prays the Court 'to make an order of Court directing that no action should be brought by the pursuer against the defenders, or any of them, within any of the Courts of the Sheriff of Lanarkshire, without the leave of the Court granted on a written application therefor by the pursuer stating the grounds for such action, and prohibiting the Clerk of Court, without such leave, from granting a warrant of service on any such action, or from issuing a summons in the Debts Recovery and Small Debts Courts.' The grounds on which an order to that effect is asked for are set forth in a statement and schedule appended to the minute, and are of a remarkable and weighty character. From the statement and schedule it appears that the present is the nineteenth action brought by the pursuer against the defenders, or one or other of them; that in every instance the pursuer has in the end been unsuccessful; but that, notwithstanding this, the defenders J. & A. Allan have been put to serious annoyance and expense, and have been unable to recover any of their costs from the pursuer. It also appears that actions of a subsidiary character have been brought by the pursuer against public officials in respect of matters arising out of his alleged grounds of complaint against the defenders. The proceedings taken by him in this way against the Procurator-Fiscal, against members of the Presbytery, and against judges of the Sheriff Court, are referred to particularly in articles 4 to 6 of the statement appended to the defenders' minute. An appeal at his instance in one of the actions brought against the Procurator-Fiscal was heard by me on the same day as the present case, and has since been dismissed with expenses. The defenders further set forth in their statement that the actions brought by the pursuer are made the means of persecuting people who have no connection with the cases, 'by citing them as witnesses, and on their failure to attend, raising actions against them for the penalty imposed by statute, as well as for damages.' The substantial accuracy of the statements made by the defenders is not denied in the pursuer's answers. While putting forward criticisms on certain of these statements, the pursuer seems mainly to rely on the plea or averment with which he concludes,

that 'the Sheriff has no power to entertain said minute.' The objection thus taken to the competency of issuing such an order as that which the defenders ask, raises the main difficulty which they have to meet, and to which the argument on their behalf was chiefly directed. The practically uncontradicted statements made by the defenders would amply justify a restraint being placed on such vexatious litigation as seems to be persisted in by the pursuer, provided the Court was shown to possess the power of preventing it. In the course of the argument for the defenders, however, it was not suggested that such an order as is asked for had ever been pronounced by a Sheriff Court, or even by the Supreme Court; but it was contended that the circumstances are altogether new, that they show the necessity for interference of some kind, and that unless a remedy be granted a serious wrong will be left without redress. The absence of precedents may to some extent be accounted for by the existence formerly of restraints against the taking of vexatious proceedings, in particular by the liability to imprisonment in the event of an unsuccessful pursuer failing in payment of the defenders' costs, which restraints have been removed by recent legislation. In this way it is said persons are now exposed to the risk of being harassed with groundless actions, unless, in cases where there is reason to apprehend such litigation, the authority of the Court is interposed to prevent it. Then, while there do not appear as yet to be any precedents to sanction such interference in Scotland, the action of the English Courts is appealed to. In particular, I was referred in the course of the argument to an order made by the Court of Appeal in *Grepe v. Loam*, 1887, 37 Ch. D. 168, where repeated frivolous applications, for the purpose of impeaching a judgment, having been made by the same parties, the Court issued an order prohibiting any further application on their behalf without leave of the Court. The order pronounced in this case, however, seems to have been directed rather against fresh applications being made in proceedings then before the Court than against the institution of entirely new actions, as is asked for by the present defenders. There is, however, a subsequent case, which seems more directly to support this application, namely, *In re Maria Annie Davies* 1888, 21 Q. B. D. 236. It appears from the report there that a woman had persisted in taking legal proceedings in defiance of judgments of the Court, and in persecuting the person in whose favour the Court had decided with vexatious actions. She had been imprisoned for a considerable time for contempt of Court, and the Court, while pronouncing an order discharging her from custody, ordered at the same time that she 'be not allowed to issue any writ or summons, or make any application or motion against any person or persons without the leave of a judge at chambers first obtained;' and it was added that 'if a notice of any application or motion be given without such leave being first obtained, the official solicitor may be informed by letter, and the respondent shall not be required

to appear unless the Court shall otherwise order.' The order thus made goes even beyond what the defenders now ask, inasmuch as it restrains actions 'against any person or persons without leave of a judge,' and so gives a wider and more effectual protection against an abuse of legal proceedings than an order limited to proceedings against particular defenders. The facts set forth in the statement for the defenders here would indicate that an order of this more general kind would be required if due protection is to be afforded against such proceedings as they describe. A reference to these authorities in the English Courts naturally suggests whether it should not be regarded as inherent in any Court to have such a power of control over proceedings before it as to prevent their being resorted to for purposes of annoyance and oppression. In considering, however, how far these cases may afford assistance as precedents for the disposal of the present application, it cannot be left out of view that they are precedents from the English Supreme Court, and not from an inferior Court. It may be taken for granted, I think, that in Scotland a like authority to restrain vexatious litigation, not only before itself, but also before the inferior Courts, is vested in the Supreme Court, whose province (to use Erskine's language) is 'to redress all wrongs for which a peculiar remedy is not otherwise provided.' A local Court is not possessed of a general authority of that nature, although there are reasons which may be regarded as cogent for holding that it ought to be possessed of a certain control over proceedings before itself. It may be said that a person harassed by repeated actions of a groundless nature before a Sheriff Court should not, in order to have them stopped, be obliged to resort for protection to the Supreme Court, and be left without a remedy in the Court below. Still, in the absence of all precedent or guidance to be derived from a judgment of the Supreme Court, I have, after careful consideration, come to the conclusion that I should not be justified in assuming the possession by the Sheriff Court of an authority to interpose in the manner proposed by the defenders, and that I ought, therefore, to refuse the prayer of the minute. The interlocutor of the Sheriff-Substitute made avizandum to me with the minute No. 8 of process and the pursuer's answer thereto. I do not understand avizandum to have been made to me with the case as a whole, and I think, therefore, that for the disposal of the case itself, the proper course is to remit it back to the Sheriff-Substitute."

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

Depute and Chief Clerks of Session.—In a high-class evening paper last month, there appeared a couple of verses (!) by an illiterate author, which may have caused some annoyance to the five gentlemen who severally act as chief clerks in the five Outer House Courts of the Court of Session. The halting lines would not require any notice from us,—notwithstanding their pretentious heading, their gratuitous attack on hard-working and responsible officials, their eccentric rhyme, and utterly unscannable character,—were it not well to point out how ignorant the anonymous scribbler is of matters he presumes to criticise. If there be any point in the print at all, we conjecture it must be this. In the Edinburgh Directory these foresaid five gentlemen are described as “Depute and Chief Clerks of Session,” and the would-be lampooner assumes that the designation “Chief Clerks” has been added by themselves for their own greater glory. To any one acquainted with the Scottish Law Courts, it will be known that the designation has been inserted for the convenience of the public, not boastfully, and gives effect to the Clerks of Session Regulation Act, 1889 (52 & 53 Vict. c. 54), sec. 1, subsec. 3,—a provision and a statute of the existence of which the versifier is apparently absolutely ignorant. We may further recall that, during the passage of the measure through Com-

mittee, the Lord Advocate stated that the words of the clause were inserted for the express purpose of preserving the status of the depute clerks as chief clerks in their respective courts. "Without leave of the Crown," asserts the versifier. Can he be under the delusion that nothing receives the royal assent unless certain men deck themselves out in fantastic garb and trumpet it from the Mercat Cross of Edinburgh?

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An Enterprising Coroner.—It was very properly attempted to conduct the execution of four men by electricity the other day in New York with due secrecy. But it would appear that this effort may be frustrated, if we are to credit a rumour which reaches us from New York through Dalziel's Agency. It is said that Coroner Levy has announced his determination to have the body of Smiler, one of the four men executed, exhumed, and to hold an inquest upon it, in which case all the persons present at the execution would be under compulsion to testify in detail as to the death of the murderer. Smiler, although put to death in another county, was buried in New York county without an inquest. Unlike the three others, who were buried in the gaol-yard of Sing Sing Prison, Smiler's body was handed over to his wife for interment. Mr. Levy says he is acting in the public interest in compelling the publication of the details of the execution.

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Select Sheriff-Court Reports.—We are informed that Messrs. T. & T. Clark intend shortly to publish a new volume of select Sheriff Court Reports, in continuation of Sheriff Guthrie's volume, published in 1879. The same plan will in the main be adopted; but, if possible, there will be a larger number of notes or commentaries, after the manner of Ross and Smith's *Leading Cases*, referring to and briefly reporting cases in the Supreme and Local Courts which bear on the subject of the selected decisions. The editor and publishers request the assistance of local judges and lawyers in this work.

Special Articles.

EXECUTION OF THE JUDGMENT OF DEATH.

THE killing by means of electricity of four murderers in New York last month, probably points to another general advance in the mode of executing the judgment of death. Nowadays the motive of civilised nations in inflicting punishment is certainly not the desire for vengeance. In the case of the capital punishment, moreover, the end in view cannot be the reform of the culprit himself, but only the deterring of others from the perpetration of the like crimes. The aim, consequently, in such cases, is to carry out the sentence as painlessly as possible, and put an end to the convict's life without any aggravation of bodily suffering. It would appear, from the accounts of the executions in New York, that science has at length taught us how such an aim may be reached. A former experiment of this kind in America failed. On this occasion the experiment has been successful. If the accounts alleged to have been furnished to the press are trustworthy, each of the four convicts was killed, literally instantaneously, and no *punctum temporis* was allowed for the transmission of sensation to the brain, or for even the momentary consciousness of it there. The accompaniments—not very serious at worst, when compared with ordinary incidents of hanging—with which reporters harrowed our feelings in the previous case, were on this occasion fortunately absent. The advocates of what is barbarously called “electrocution” (even by educated people and by well-conducted magazines) may therefore claim a fair measure of success for their reform, and may reasonably look for its general adoption in the United States. Its introduction elsewhere is, in all likelihood, but a matter of time. In regard to this country, that time will probably be a long time, for we are slow to move, and will sentimentally cling to our time-honoured hanging, endeared to our public by so many tender associations both of fiction and of fact, yet if capital punishment survives amongst us, say for another score of years, we are pretty sure to adopt the

American method, and, alas! the American terminology as well.

In Scotland the punishment of death has for many years been inflicted only in one way, that, namely, of hanging by the neck on a gibbet or scaffold, as Hume says, "without any aggravation of bodily suffering." But it was not always thus. Our predecessors in the burghs and counties which we now inhabit were not possessed of ideas and feelings in advance of their times, and did not "seek in anything to vary from the kindly race of men." In Hume's time, in the cases of cruel and atrocious murder, the right hand of the criminal was sometimes struck off before he was hanged. This sentence, for example, was passed on Norman Ross, a servant who had murdered his mistress, in 1751. Referring to punishments for treason in his time, the same learned commentator (ii. 482) remarks that "a female offender perishes by fire, and a man is executed with many additional circumstances of indignity and distress." On July 17, 1537, Lady Glamis was burned quick for treason. These aggravations of suffering, however, were usually remitted by the sovereign. Thus, in the case of Robert Watt, tried for treason in 1794, the king ordered all such accompaniments to be left out, and directed that, in lieu of them, the head should be severed from the body when lifeless, and be held up in view of the people. The deterrent effect of the execution was here the end in view, the exhibition of the lifeless head being likely to fix itself in the imagination of the spectators, and cling tenaciously in their memories, while all torturing of the culprit was humanely avoided. The statute 30 Geo. III. c. 48 provided that a *woman* convicted of treason or petty treason should be drawn on a hurdle to the gallows, and there hanged by the neck. The same doom was provided by 54 Geo. III. c. 146 in the case of a *man* convicted of treason; but the head was afterwards to be severed from the body, and the four quarters were to be "at his majesty's disposal." A further power, however, was reserved to the king, who might order by sign-manual that the convict should be carried to the place of execution in any way the order might appoint, and that he should be beheaded instead of hanged.

In still earlier times the modes of putting criminals to

death were various. They were often characterised by the infliction of much suffering, as well as indignity, on the unhappy convicts. The ordinary mode in the case of all "high and atrocious crimes," particularly in the case of murderers, habitual thieves, and robbers, was beheading. But there were frequent departures from this practice. Thus John Dickson of Belchester, for the murder of his father, was, on 30th April 1591, broken on the wheel. The same fate overtook one Robert Weir, "who murdered Kincaid of Warriston, at the instigation of his spouse." The doom ordered him to be broken alive upon a *row* or wheel, and to remain exposed upon it for twenty-four hours; and thereafter it was ordered that the row should be set up between Leith and Edinburgh, at the place where the murder was done. Hume quotes from the diary of Robert Birrell an entry referring to this execution. It runs thus: "The 16th Junii, *Robert Weir* broken on ane cart wheel, with ane coulter of ane pleuche, in the hands of the hangman, for murdering the guidman of Warriston, whilk he did 2nd Julii 1603." This remarkably cruel mode of execution was adopted from France. Death by burning was frequently resorted to, especially in certain classes of crime. In cases of heresy and of witchcraft, the inevitable doom was "to be burned quick." Euphan Mackelzean was sentenced "to be burned quick to the death" in 1591 for a combination of sorcery and treason. Burning was also common in cases of incest and of bestiality. Thus in 1570, 2nd February, James Bonnar and Agnes Bonnar were doomed to be burned for incest and adultery. In 1630 a man suffered a similar doom for sodomy.

In April 1670, one Major Weir, on conviction of incest and bestiality, was sentenced to be *worried* (strangled) at the stake, and his body burned to ashes—a sentence which was passed also in the case of several other recorded convictions of bestiality. Worrying at the stake was not unusual. We read (Law's *Memor.* Pref. lix.) that "one John Brugh, a notorious warlock (wizard) in the parochin of Fossoquhy, by the space of thirty-six years, was worried at a stake and burned, 1643." Drowning as a mode of execution was also resorted to, and there are a few cases of this on record. In Edinburgh this form of sentence was carried into effect "in

the loch in the north of the city." This was the fate of Helen Faa, a gipsy, and the females of her tribe, in 1624; of George Sinclair, for incest, in 1628; and of James Mitchell, for bestiality, in 1675. All such cruelties and aggravations have long fallen into desuetude. Their infliction was barbarous, no doubt; but we ought not to fall into the common error of forgetting the times in which they had their day, and of looking at these times through modern spectacles.

Even the deterrent effect of executions in presence of the public is no longer desired. The Act of 1868 (31 & 32 Vict. c. 24) provides that capital punishment is to be carried into effect within the walls of the prison in which the offender is confined at the time of execution. The public are carefully excluded from the spectacle. Only the magistrates charged with seeing the sentence carried out, the gaoler, chaplain, surgeon, and such other officers of the prison as the magistrate requires, are now present. But any Justice of the Peace for the jurisdiction to which the prison belongs is entitled to be present, and there is power also to admit such relations of the prisoner or other persons as seem proper to the said magistrates or to the visiting Justices. All the revolting features of the executions have thus been abolished, and the brutalising effects on a public too readily debased are now carefully guarded against. At the same time we find in the Act referred to a recognition of the fact that it is well to bring home to the public impressively the fate which the convict has met. There is a power (sec. 7) to one of Her Majesty's Principal Secretaries of State to make rules for the purpose of giving greater solemnity to executions, and of making known without the prison walls the fact that such execution is taking place.

"Vengeance was pursued further than death," in respect to the disposal of the body. In cases of treason, as we have seen incidentally, the head and four quarters of a male convict were at his majesty's disposal. The Court sometimes ordered the body to be "hung in chains." This, for example, was done in the case of George Tillery, for murder, in 1630, the order being that his body was "to hang y^e after in ane irone cheinze, quhile he rot away, to the terror and exampell of utheris." A similar order was made in many other cases

of which we have record. The Act 25 Geo. II. c. 37, appointed the body to be delivered to a surgeon for dissection.

In lieu of all which revolting degradation, it is now tamely and soberly enacted that "the body of every offender executed shall," after the requisite inquest, "be buried within the walls of the prison within which judgment of death is executed on him."

J. C.

SOME NOTES ON SCOTTISH CRIMINAL PROCEDURE.

THE existing Scottish system of procedure in criminal cases may roughly be said to be the result of an admixture of common law, statute law, and orders issued by the Justiciary Office. The most drastic changes on the system were those introduced by the Criminal Procedure (Scotland) Act of 1887, but still it is humbly thought that many further changes might be as desirable as those which have been already made. For example, it is unfortunate that the Triple Verdict should be allowed to continue in existence. In our practice a jury in a criminal case has the power of returning one of *three*, as against the ordinary jury right of one of *two*, verdicts. They may find an accused person *guilty* or *not guilty*, or they may find the charge *not proven*. Of course the verdict of *not guilty* implies that of not proven, but the verdict of not proven is a very different one from that of not guilty; and it is somewhat incomprehensible that Scotland, which has given to the science of logic some of its greatest masters, should cling so tenaciously to such an absurdly illogical verdict. When a man is placed at the bar of a criminal court, what is it that the jury have to decide? It cannot be his absolute moral guilt; for if that were so, it would be tantamount to inviting a body of men—indifferent men, as they are called, that is, men of average intelligence, neither very wise nor very simple—to arrogate a divine insight, and to assume (as Hawthorne puts it) "the awful garment of the Omnipotent Wisdom." It is not the moral guilt of a prisoner which a jury is balloted to determine; the jurors are simply put in the box to answer the question: Has the prosecutor proved that the

prisoner did so-and-so, or not? If he has, then the prisoner is legally guilty; if he has not, then he is not legally guilty. It is purely a question of fact, not of morals; and probably the better way of expressing the option which the jury has, would be to call it a choice between proven and not proven, rather than as is done between guilty and not guilty. But the excrescent verdict which is known in Scotland as not proven—"this miserable *medium quid*, this cowardly *petitio principii*," as Sir Walter Scott has called it—affects to deal with moral as opposed to legal guilt. If it means anything more than that the jury is in a fog of doubt, it means that it returns this answer to the charge: We do not think the prisoner legally guilty, or rather we find that the prosecutor has failed to convince us that the prisoner did what he is alleged to have done; but we think him, all the same, morally guilty. Which, of course, is in direct antagonism to the wholesome and firmly-settled principle that, before the law, every man is innocent till he is proved to be guilty. It is not easy to discover how this verdict had its origin, but it seems reasonable to conjecture that in the earlier course of procedure, juries in Scotland were allowed indifferently to use the forms, "We find the panel not guilty," and "We find the charge not proven" as their absolver verdict, and that gradually, from sheer neglect to consider the probable consequences in the future, the mischievous distinction which now exists crept in,—a distinction which assumes the right of a jury to exercise a moral censorship. It would be an unnecessary waste of time to enter upon an enumeration of the evil consequences hanging on the existence of this third verdict; they must be perfectly patent to all who have any experience in dealing with the investigation of crime, real or imagined. One of the least of these consequences, though a bad one still, is that the verdict offers a strong temptation to lazy jurymen to scamp their work and screen themselves under its vagueness. A very much worse consequence is, that it fixes on accused persons acquitted under it a stigma, which is more than they deserve if they are innocent, and less than they deserve if they are guilty. But perhaps one can scarcely wonder at the maintenance of such a verdict when it is remembered that a jury in a criminal case takes the

apparently irrelevant oath that they "will truth say and no truth conceal"—clearly an oath for a witness, and not for a body of judges.

Another point which must strike any who take an interest in the reform of criminal procedure as one on which much more improvement might be made than ever yet has been, is in regard to the judicial declaration which a prisoner emits if he is so minded on his apprehension. Down to the date of Lord Kingsburgh's Act, he was taken into the presence of a magistrate without the opportunity of consulting a solicitor, and there *pumped* in absolute privacy, so far as the accused's interests were concerned, as to his connection with the charge made against him,—the pumping process being theoretically conducted by the magistrate, but in practice usually by the prosecutor or one of his myrmidons. Now-a-days, under the Act referred to, an accused is allowed to have a consultation with a solicitor before he undergoes the examination which results in his judicial declaration, and has further the advantage of whatever moral support he can extract from the presence of his solicitor at the examination; the said solicitor, however, being bound apparently by the 17th section of the Act to remain dumb during the proceedings. The section referred to provides that the examination "shall be conducted according to the existing practice," which probably means according to the existing *theory* which laid the duty of examination on the magistrate alone. If that theory be discarded and the actual practice of most magistrates substituted, it seems rather hard on the prisoner that the prosecutor should have it all his own way without the corrective of an examination also by the solicitor for the accused. It is understood that certain magistrates who are in the habit of allowing examination of accused persons by the prosecutor, explain their doing so in such a manner as still to support the theory of the examination being magisterial—namely, that the prosecutor examining is merely acting as the mouthpiece of the magistrate, whose (necessary) presence practically prevents anything like bullying or unfairness being resorted to. Magistrates who hold this view will probably also allow the agent for the accused to suggest questions, and allow them, if right, to be put, and the answers

to form part of the judicial declaration, so that matters may probably work themselves out in a more satisfactory manner than is actually provided for by the statute. There are some points as to judicial declarations, however, which have not been attempted to be touched by the Act of 1887 or any previous one. Of course there are many who hold that the secret investigation of the proof of crimes up to trial, which is existent in Scotland, is bad root and branch, and that much more satisfactory results would attend the adoption of the system of public inquiry by examination of witnesses, with right to the accused to cross-examine, as a preliminary to committal for trial. With regard to the graver charges of crime, this view (which will be referred to by and by more particularly) seems sound; but, be that as it may, it is thought that so long as a judicial declaration continues to be taken from the prisoner, that declaration ought always to form part of the case laid before the jury at the trial; it should not be in the option of the prosecutor to produce or withhold it as he pleases. The investigation of crime is a public matter, one in which the community is directly and distinctly interested to see that justice is done. The declaration of a prisoner, if it contains a straightforward account of what seem suspicious circumstances against him, though by itself of no use, may become an important adminicle of the evidence in his defence. No doubt there is the rule, that what a man says in his own favour is not to be believed, because it is his interest to set himself up; and that what he says against himself is to be believed, because it is his interest not to say anything to his own detriment. If this rule is to be adhered to, it should be adhered to in its entirety; and the result would be that a declaration in which a man admitted guilt would not be used, because of its being that of a man who was so mentally unbalanced as to be ignorant or forgetful of what was for his own interest. No doubt he is magisterially cautioned that he need not answer any questions at his judicial examination; but if he does not answer, the fact of his declinature is recorded and referred to, and produces its own effect on the mind of the jury, prejudicial usually to the accused. Can there be any possible harm in allowing in every case the declaration of the prisoner to be put to the jury *quantum*

valet? This seems a better and juster practice than even allowing the prisoner to give testimony on oath, which he is allowed by statute to do in some cases, and which there is presently an agitation to allow him to do in all. The inevitable final argument of all supporters of the *status quo* as to the use of declarations resolves itself into this, that the declaration having been taken at the instance of (and usually by) the prosecutor, it belongs to him, and the panel has nothing to do with it. No doubt it belongs to the prosecutor, but to him as agent for the public interest; and it cannot be too often or strongly emphasised that it is not the public interest to obtain as many convictions as possible, as some representatives of the prosecutor seem to think, but to have justice done to the prisoner, who is himself one of the public.

One must regard it as a sort of corollary to the right of the public prosecutor to determine whether a declaration should be put to, or withheld from, the jury, that he has it also in his power to determine whether or not punishment shall follow on conviction. In order to the pronouncing of sentence on a convicted person, it is essential that the prosecutor should move for sentence on him; it has been held several times in Scotland that if he declines to do so the Court cannot proceed to award judgment. What the *rationale* of this rule is it seems difficult to conceive. It is intelligible that the prosecutor should act for the public interest up to the stage of conviction; after that stage one would imagine that the law, as represented by the judge, should take the place of the prosecutor—still, like him, for the public interest. It is undoubtedly the province of the judge to *apportion* punishment; yet the prosecutor, according to the present system, can refuse to allow any punishment at all to be inflicted. This is surely an anomaly, and one which is not fanciful, but which has led to most objectionable results in the past, and may do so in the future. As an instance, take a case which occurred some years ago in the Sheriff Court of Dumfries. A medical man, possessing considerable practice and influence in the district where he lives, was convicted of giving certificates of vaccination in cases in which the operation had not been performed. Before moving for sentence the prosecutor proceeded to sound the Sheriff as to whether he would impose a fine as

an alternative to imprisonment. On the Sheriff very properly declining to give him any enlightenment on the subject, the tender-hearted prosecutor solved the difficulty to his own, if not to the public satisfaction, by declining to move for sentence. And one can readily believe that in earlier times such cases were not of rare occurrence; indeed, it almost looks as if the practice of moving for sentence had arisen in order to deflect to some one other than the judge the odium of allowing influential wrong-doers to escape punishment. And one can further very readily conceive that, even yet, especially when party spirit ran high, there might be very strong temptations to a prosecutor (say, for the sake of example, in a case under the Corrupt Practices Act) to exercise this right of his to the prejudice of justice. Surely the question of *any punishment* would be more naturally and more properly placed in the hands of the same person who determines *what punishment*, that is, to the judge, who, removed in most cases from the political sphere in which prosecutors as a rule have their being, is not exposed to the same temptation to an injudicious clemency which might be mistaken by the public.

The mention of the determination of the amount of punishment suggests this observation, that he would indeed be a beneficial reformer who could devise some means by which uniformity of punishment might be approximated. Meanwhile, a prisoner's punishment pretty much depends on who is his judge, rather than on what is his crime. That is to say, the standard by which the gravity of any particular crime is judged is a fluctuating one, depending largely on the habits of thought of the individual judge—depending, it is sometimes wickedly asserted, on the state of his body even. A general illustration of what is meant is afforded by the case of the two prisoners in England who were accused of stealing some poultry from a hen-house. One of them pleaded guilty, and the judge, remarking that it was not a very serious crime, but must nevertheless be suppressed, sentenced the prisoner to a few months' imprisonment. The other prisoner pleaded not guilty, and, his trial being adjourned, it was before another judge that he was convicted. Unfortunately for the prisoner, his Lordship had views on the subject of chicken stealing, regarding it as the root of all evil, and the man who

could rob a hen-house as a potential Bill Sykes; and he therefore sentenced this unfortunate victim of circumstances to a period of penal servitude. In our own part of the island cases of great dissimilarity of punishment of the same crime are of not infrequent occurrence. Undoubtedly the character and course of life of the prisoner have to be taken into consideration in each case, as well as the nature of the particular crime; but even this does not fully account for the great inequalities between sentences which one sometimes encounters. Within certain limits a judge can pronounce what sentence he pleases; and when it is remembered that, after all, judges are only human, and liable to fads like other people, one is apt to think that in the interests of justice it might be as well that the limits should not be quite so wide as they are. No doubt the criminal classes who are diligent students of the daily press are quite aware of the existence of inequalities in sentences arising from the views taken of particular crimes by particular judges, and make it a daily petition to the gods who preside over their respective arts that when they do fall into trouble they may be tried by this or that judge, according to the craft they practise.

There is another part of the judge's duty in a criminal trial which perhaps is too long and deeply rooted in the system to allow of the hope of its ever ceasing to be part of his duty, but which is still open to criticism, and that is the summing-up by the judge to the jury. The jury hears the evidence summed up by the public prosecutor for the Crown; it hears it summed up by the prisoner's counsel for the defence; is it necessary that it should be summed up a third time? Were the judicial summing-up to take the form of a mere reading of the judge's notes without comment, it might be of use in correcting any exaggerations or omissions made by counsel on either side; but the judge has yet to be born who can help showing his mind to the jury; and in most cases the jury is glad enough to endorse his view, and save itself the trouble of independently thinking out the case. Of course in all questions of law the judge, and the judge alone, is the proper person to decide, but the jury is no less *sole* in its own department of fact. It is an ancient constitutional principle that a man shall be tried by his peers; yet, notwithstanding, it

very often happens that though a prisoner seems to be tried by a jury, he is really tried by the judge, the gentlemen in the box merely giving assent to what his Lordship considers proved. This is undoubtedly the fault of the jury; but is it wise to allow it the opportunity given by the judge's summing up of evading its duty? It may be that the judge's view is right; but what is wanted is the jury's view of the evidence of guilt, arrived at by a deliberate and independent exercise of the judgment of each of the fifteen jurors. In the general case, if the judge does the jury's work of sifting the evidence, the jury will be inclined to endorse the result without going into the matter for themselves.

Perhaps one of the most beneficial changes introduced by the 1887 Act is, that previous convictions of crime are no longer laid before the jury. The spirit of the law always was that the crime charged should be proved for itself; but the letter of the old indictment, by the insertion of a statement of such previous convictions as existed, raised a very strong presumption against the prisoner to start with, which not seldom led to his conviction where the general evidence was defective. Previous convictions are now, by the 67th section of the Act, put on their proper footing as aggravations of crime in regard to the punishment of it, not the fact of it, and are kept from the knowledge of the jury except in those rare cases in which, prior to the Act, previous convictions were evidence *in causa* in support of the substantive charge, and, of course, in those cases also in which an accused proposes to set up his general character. Curiously enough, however, the fact of habit and repute is still left to the jury, which seems to do away, to a large extent, with the good results obtained by section 67, and to be inconsistent with the spirit of that section. Thus Lord Shand expresses the matter in *Her Majesty's Advocate v. Hunter*, 1890, 17 R. 57: "There can be no doubt, I think, that if legislation had been consistent, the Criminal Procedure Act should have provided that evidence in support of the aggravation that the accused is habit and repute a thief should not be laid before the jury, and that the charge against the accused of his having been habit and repute a thief should not be mentioned unless and after a verdict of guilty should be returned. . . . The

proof that prisoner is habit and repute a thief is mainly founded on the fact that he has been repeatedly convicted of theft, and that during the intervals between periods of imprisonment he has consorted with thieves." Probably when a revision of the 1887 Act is made, and it certainly requires revision and explanation in many respects, habit and repute will, like previous convictions, be made matter for the consideration, not of the jury, but of the judge. Meanwhile it is thought that what has already been done is a great gain to the fair dealing which every accused person is entitled to in the investigation of the particular crime with which he is charged, enabling the jury, as it does, to come to the consideration of the evidence perfectly unbiassed either way.

Reference was made earlier in the article to the view held by many persons that public preliminary investigations are better than those conducted privately, and there is much to be said in favour of the former system from the standpoint of the accused. But it seems right in judging of the merits of the two systems to note the distinction between those cases in which, as a result of preliminary investigation, trial is ordered, and those in which it is decided to abandon action. In the former, that is, where prosecution follows, it matters little whether the preliminary inquiry was public or not, because the result is made public at the trial. But where no proceedings are taken, undoubtedly public inquiry is fairer to the accused. Not very long ago a case arose which illustrates what is meant. Of two brothers who lived together one died suddenly, and strong suspicions were directed in the district against the other. Inquiry took place, and after the accused brother had been a few days in prison, the prosecutor abandoned action. But what led him to abandon action—probably the medical report—never became public, and the consequence was that for long a man presumably innocent was an object of suspicion to his neighbours as having had some concern in his brother's death. Public inquiry would have obviated this, and doubts in the public mind as to the innocence of a prisoner so discharged could scarcely occur in England. Would it not be well if in Scotland too, where men are handicapped enough already, there should not be the possibility of an innocent man being socially dealt with as a quasi-criminal?

Appointment.

MR. MARK GEORGE DAVIDSON, LL.B., Advocate (1883), has been appointed Sheriff-Substitute of Lanarkshire at Hamilton, in room of Mr. Birnie, transferred to Glasgow.

Obituary.

MR. WILLIAM PAUL, Writer, Bo'ness, died there on 2nd July, at the age of sixty-two.

MR. WILLIAM ROSS THOMSON, Solicitor, formerly in practice in Dingwall, died in Glasgow on 5th July.

MR. HUGH LYON, of Glenogil, S.S.C., died in Edinburgh, on 8th July, in his eightieth year. Mr. Lyon, educated at Edinburgh and Glasgow Universities, was admitted a member of the Society of Solicitors before the Supreme Courts in 1851, and was in practice in Edinburgh for many years.

MR. JOHN KIPPEN, Solicitor, Perth, died there on 9th July, in his seventy-eighth year.

MR. HECTOR F. M'LEAN, W.S., died at Carnwath, on 10th July. Mr. M'Lean was admitted a member of the Society of Writers to the Signet in 1845, and was a J.P. and D.L. for Lanarkshire.

The Month.

Sir Walter Scott.—An English Law Journal calls attention to the fact that on the 30th June 1791, Sir Walter Scott passed the Civil Law Trial, preliminary to his admission to the Faculty of Advocates.

* * *

A Candid Witness.—The other day an English witness was being examined before Lord Kyllachy in a domicile case, when the following passage occurred:—

Counsel: "Did the deceased ever talk of Scotland?"

Witness: "Yes, at times."

Counsel: "What did he say about Scotland?"

Witness: "He spoke about the law lords in Edinburgh."

Counsel: "About the law lords in Edinburgh? and what had he to say about them?"

Witness: "He said that most of them drank a great deal of whisky."

* * *

The Scotch Private Procedure Bill.—The London *Law Times*, which has throughout been extremely hostile to the Government measure in regard to Scottish Private Bills, indulges in the following *wake* under the above title:—"Amongst the measures announced as abandoned by the Government for this session, will be noticed the name of the Private Bill Procedure (Scotland) Bill. We question whether its untimely death will be lamented by any one. As we took occasion to point out when the measure in question was introduced, the Government do not seem to have known their own minds on the subject. It had been represented by the Scottish Home Rulers, and by some of the Scotch M.P.'s, that great dissatisfaction existed in Scotland with the present mode of legislating on private questions for that country. The objections were founded on the fact of the great expense and inconvenience incurred by the parties interested in coming up

to London to attend to their respective measures, and it was also argued that the decisions of Parliamentary Committees were often opposed to Scottish local opinion. Although it was notorious that all the large corporations and companies who have to do with private Bills were really in favour of continuing the present system, and regarded the decisions of Parliament as the most satisfactory that could be obtained, the Government yielded to the pressure thus exercised. In three successive sessions a measure dealing with the question was promised in the Queen's Speech. In the present year, the Bill now abandoned was adopted in preference to that of the late Mr. Craig Sellar, and brought before the House. It proposed to refer such Bills as exclusively related to Scotland to a hybrid Commission. This was to consist of one judge of the Court of Session, one railway commissioner, an M.P. selected by the committee of selection, and an engineer or expert. This Commission was to sit at various centres in Scotland, and to report upon each private Bill to the House, its report to have the same value as that of a Select Committee. This measure was itself referred to a committee, and met with great opposition, even from the Scottish Radicals. It was denounced as unconstitutional, the House of Lords not being represented upon the proposed Commission. The constitution of the Commission was also objected to. To remedy these defects, it was proposed to refer the Bills to a joint committee of both Houses. But, further, the principle of local inquiries, which was the very essence of the Bill, was objected to. It was agreed, so far as the committee went, that the new Commission should primarily sit at Westminster, and should only have the power of sitting locally for purposes of inquiry, where this was thought desirable. It is not to be wondered at that no one was enthusiastic in favour of this emasculated measure, and that its extinction was long seen to be inevitable. Should the present Government, or its successor, still think it desirable to legislate upon the subject, perhaps they will consider carefully beforehand what reforms they desire; or even the prior question may be thought of—whether it is really necessary to legislate at all."

Innkeepers' Negligence.—Those who keep inns and make profit of their generosity and goodwill stand in a somewhat peculiar, and in perhaps no enviable, position in the eye of the law. Their very calling is deemed a constructive contract with every customer that the latter and his goods will be kept safe, except for some act of God or the king's enemies, or unless the guest is himself negligent, and thereby invites his misfortune. Hence it is obvious there are many points in the multifarious relations between host and guest which must give rise to difficulty. The negligence of the guest is of itself a fruitful ground of controversy in the event of thieves and burglars gaining a success; and the position of the innkeeper as regards his own servants is sometimes qualified by circumstances. The statute of 26 & 27 Vict. c. 41 was also an important qualification of his liability when the guest has valuables and declines to deposit these for safe custody with the innkeeper. The limitation of the liability in certain cases has always been deemed a reasonable protection, considering the great risks to which an innkeeper is exposed in course of exercising his vocation. The question of his liability when the guest is negligent is one which is susceptible of endless variety, and must always be of interest to those who travel and take their ease in their inn.

The principle on which an innkeeper is liable for loss of the guest's goods at common law was explained by Lord Tenterden in *Kent v. Shuckard*, 2 B. & Ad. 803. A gentleman and his wife had gone to Brighton, and occupied a sitting-room and two bedrooms in the defendant's hotel. One day the lady laid her reticule on the bed, containing her money, and went into the dining-room for something, leaving the door between the rooms open. When she returned, within five minutes, to the bedroom, the reticule was gone, and nobody knew how. The guests sued the innkeeper, who set up the defence that he was not liable, and, at all events, he was not liable for loss of the money, even if he were liable for loss of the goods. Lord Tenterden said this, on giving judgment for the plaintiff: "The principle on which the liability of an innkeeper for the loss of the goods of the guest is founded is, both by the civil and common law, to compel the innkeeper to take care that no improper person be

admitted into his house, and to prevent collusion between him and such person. If a lady were to leave a valuable shawl in her room, the innkeeper, though unacquainted with its value, would clearly be responsible for it if lost; and, upon the same principle, he must be so in the case of the money of the guest."

In this class of cases the innkeeper, when sued, usually sets up the defence that the guest was careless, and brought the loss on himself; and some years ago, one of the usual marks of carelessness was said to be the neglect of the guest to lock his door when he went to sleep. Several cases in succession turned very much on the circumstances in which carelessness may be imputed to the guest. In such cases it is not usual for the hotelkeeper to rely on the honesty of his servants, for the law makes him liable for their dishonesty, without any discrimination. In other situations, a master is often exempt from liability if he takes care to select and employ honest servants; but not so with an innkeeper, who, to some extent, guarantees this honesty. In a case, of *Richmond v. Smith*, 8 B. & C. 9, a traveller went to an inn and desired to have his luggage taken into the commercial room, to which he resorted, and from which it was stolen. An action being brought, the defendant contended that the plaintiff, by ordering his goods to be taken to a particular room, had thereby taken them into his own protection. But the Court held that such a distinction was not tenable, for the landlord was liable when once the goods were brought to the inn by the guest. And if it had been intended by the landlord not to be responsible unless the guest chose to keep his goods in his bedroom, then the landlord should have so informed the guest.

The controversy arising out of the guest not locking his bedroom door at night was brought out prominently in *Oppenheim v. White Lion Company*, L. R. 6 C. P. 515. The plaintiff arrived at a hotel in Bristol late at night, and went to the commercial room after securing a bedroom. While in that room he took out his purse to pay a small sum, and then had £22 in gold. He directed the chambermaid to leave his bedroom window open, because he slept usually with open windows. It so happened that this window opened out on a

balcony, whereby access could be had from other rooms. He omitted to lock his bedroom door before going to sleep. Next morning he found his pocket had been turned inside out, and the money gone. An action being brought, the jury found for the defendant, because the plaintiff had not used reasonable care. The Court held that the verdict was right, for that the fact of the guest not locking his door was some evidence of negligence. The Court said that it was a question of degree, and the jury must decide. In another case, of *Spicer v. Bacon*, 2 Q. B. D. 463, the plaintiff had gone to a hotel at Brighton, having some valuable property of small bulk in his trunk, valued £114. When he went to bed he did not lock his door, and his money and his valuables were placed on a table and chest of drawers. During the night these things were stolen, and the guest sued the landlord. The jury found that there had been negligence in not locking the door, and in other particulars; but the judge took a strong view, and, thinking there had been no negligence, entered the judgment for the plaintiff. The case was taken to the Court of Appeal, and the Lords Justices held that it was entirely a question for the jury whether there had been negligence. The Lord Chancellor, sitting as one of the Lords Justices, said that the right question for the jury was not whether the plaintiff ought to have locked his door, but whether he had taken reasonable care. The charge to the jury should have been this: "You have all the circumstances before you, and you can see what steps the plaintiff could have taken to secure his property, and you must consider whether he ought to have locked his door."

Another case, of *Jones v. Jackson*, 29 L. T. N. S. 399, had shortly before been decided somewhat to the same effect. The plaintiff had gone to a hotel and engaged a bedroom, in which a notice was hung up: "The proprietor will be happy to take charge of any valuables." He did not act on this hint, but went out leaving his trousers on a chair, having £24 in the pocket. On returning in the evening he found the money missing. On an action being brought, the jury found that the plaintiff was guilty of negligence. The Court had to consider whether this was supported by the evidence, and all the four judges held that, after the invitation suspended in

the bedroom, which they said was like a warning of some risk, and his declining to take advantage of the deposit with the landlord, he was rightly found guilty of negligence. Another case, of *Herbert v. Markwell*, 45 L. T. N. S. 649, again involved the feature that the bedroom door had not been locked. The guest and his wife had engaged a bedroom, and her valuable jewellery was left on the table when they went to sleep at midnight. About three o'clock the wife discovered that the jewellery had been stolen. There was some doubt whether the bedroom door had been locked, but it was not shown that it was locked. The jury found, on the evidence, that the loss would not have occurred if the plaintiff had acted with ordinary care, and judgment was entered for the defendant. The Court had afterwards to consider whether this judgment could be supported. The Court held that, though the mere fact of not locking the bedroom door was not conclusive, still it was some evidence of neglect, and the verdict could not be disturbed.

These cases show that it is an awkward mistake for a guest not to lock his door, and this circumstance will usually turn the scale against him in the event of his bringing an action. After the lapse of many years a further difficulty has arisen in reference to this kind of action, arising out of the time at which the guest became a guest. In the recent case of *Medawar v. Grand Hotel Company*, the plaintiff had travelled by a night train to Liverpool to attend a steeplechase, and arrived at Liverpool about 6 A.M., and went to the hotel of the defendants, carrying three articles of luggage—a port-manteau, a hat-box, and a dressing-case bag. On arrival he asked for a bedroom, and was told the house was full, but that one of the bedrooms which had been engaged was not yet occupied, and he might have the use of it for washing and dressing. Thereupon he went up to No. 97, and his luggage was also taken by the porter and left with him there. In the room there was posted up the usual notice: "For safe custody of money and valuables, visitors are requested to apply at the office," and then there was a quotation from the Act 26 & 27 Vict. c. 41, sec. 4. There was also on the door, inside, a notice: "Visitors are requested to lock and bolt their doors before retiring." There was a key in the door,

with the number of the room marked on a label attached thereto. After going into the room the plaintiff opened his bag, and took out a stand in which various articles for the toilet were kept, and there was a drawer in this stand containing trinkets. The plaintiff dressed, then, leaving the things on the table and without locking the door, he went downstairs and took breakfast, paid for it, and went out without giving further information to any one. On the same day, about 9 P.M., the lady and gentleman who had previously engaged this room arrived, and upon going into their room found the plaintiff's luggage. On calling the attention of the manager to these things, the page removed the articles into the corridor, leaving them there just as the plaintiff had left them in the room. On the plaintiff returning at midnight and asking for his room, he was told that there was none ready for him; but on inquiry it was found that a room had just been vacated, and this was given to the plaintiff. His name was then entered in the books, and the luggage taken to the room. Next morning the plaintiff discovered that his trinkets were missing. An action was brought, and the judge, who tried the case without a jury, had to determine the liability.

The judge held that the first question was whether the articles were stolen when the plaintiff was a guest. The plaintiff had washed himself and gone away, and the goods most probably had been stolen during the day, before he returned and became a guest in the evening. The liability of the hotelkeeper did not begin till the evening; hence it was the negligence of the plaintiff himself which led to the loss, for he left the articles exposed, and there was evidence that the articles had been stolen while they lay in the corridor between 9 P.M. and 12 P.M. The judge, for these reasons, held that the plaintiff could not recover.

These cases furnish valuable lessons for all travellers, and point out the weak point in their negligent habits while guests.—*Justice of the Peace.*



Questions of Legitimacy.—To the student of the growth and development of our law, the consideration of the different

views that have from time to time obtained on the question as to how far and by what evidence it is competent to show that a child born during wedlock is not the legitimate offspring of the union of the husband and wife, is one of great interest. The law presumes, and always has presumed, that a child born in wedlock is the legitimate offspring of the parties to that wedlock. But its attitude as regards the strength and character of the presumption has been in the course of some two or three centuries considerably changed. At one time it would appear to have been almost a *præsumptio juris et de jure* that a child born during wedlock was legitimate. The rule is thus stated by Coke (Co. Litt. sec. 244a): "By the common law, if the husband be within the four seas, that is, within the jurisdiction of the king of England, if the wife have issue, no proove is to be admitted to prove the child a bastard (for in that case *filiatio non protest probari*) unless the husband hath an apparent impossibility of procreation." It need hardly be said that such a rule is technical and unsatisfactory in the highest degree, and if insisted upon must have been the cause of much injustice. At a later date the strictness of the rule was somewhat modified, and it seems to have been held that the mere fact that the husband was *intra quatuor maria* was not conclusive in favour of a child's legitimacy, but it was, however, necessary for any person contesting a child's legitimacy to show circumstances which made marital relations between its parents impossible.

Such appears to have been the early law on this question. The modern law on the subject may be said to be dated from a decision of the House of Lords in 1836 in the case of *Morris v. Davies* (5 Cl. & Fin. 163), in which it was declared that the presumption of law in favour of the legitimacy of a child begotten and born of a wife during a separation may be rebutted by evidence of the conduct of the husband and wife. Two cases have within the last two or three years been before the courts, in which the law as laid down in *Morris v. Davies* has been in some degree extended. One of these, decided in 1887, was the case of *Bosville v. The Attorney-General* (57 L. T. Rep. N. S. 88; L. Rep. 12 P. Div. 177). It was a petition under the Legitimacy Declaration Act, for

the declaration of the legitimacy of a child under the following circumstances. The wife, who had been living under her husband's roof, eloped from him, and 277 days afterwards gave birth to the petitioner. The normal period of gestation, according to the medical evidence adduced on the hearing of the petition, appears to be from 270 to 275 days. A period of gestation exceeding 275 was said to be "somewhat exceptional but not abnormal, verging towards abnormality, but not necessarily so." The question to be decided was, whether the petitioner was the child of the wife's husband or paramour. Certain evidence was given which will be found stated in the report, but with which it is not here proposed to deal, inasmuch as our only object is to show the inroads made by recent decisions into the old common law doctrines. Lord Hannen (then President of the Divorce Division), who tried the case with a special jury, directed them that it was for them to say whether, on the whole of the evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child. The jury having found against the legitimacy of the child, a divisional court, consisting of Lord Coleridge and Mr. Justice Butt, held both the direction and verdict right. This decision was followed in 1889 by the case of *Burnaby v. Baillie* (61 L. T. Rep. N. S. 634; 42 Ch. Div. 282), in which, on the evidence, notwithstanding the fact that the husband and wife had not separated, but were living together in the same house during some part of the period of gestation, the child was held to have been proved not to have been the offspring of the husband. These two decisions have gone considerably beyond any of the cases which have preceded them; but they may, it is imagined, be taken to have settled the law on the question of the legitimacy of children born during wedlock. The presumption in favour of the legitimacy of such a child is a presumption which exists only till rebutted by proper evidence, and the evidence required to rebut such a presumption will be such as establishes, to the mind of the judge—to use the words of Lord Hannen—"conclusively, not by way of conjecture, but by way of conviction, that the child was not the child begotten by the husband." In other words, the weight of evidence

required to rebut the presumption of legitimacy will be the same as that required to rebut any other *presumptio juris*.

There is perhaps one rule of law applicable to this class of case which may reasonably be thought to require alteration, and that is the rule which makes the evidence of the husband or wife inadmissible to prove the illegitimacy of a child born in wedlock. This rule is stated by Lord Mansfield, in *Goodright v. Moss* (2 Cowp. 594), to be founded "in decency, morality, and policy." But it is difficult to extract a reason for its existence from this statement. With regard to the question of decency in an issue between parties, the mere fact *per se* that the evidence in support of the case of one of the parties is of a character which may be called indecent, is no reason for excluding it. Indeed, Lord Mansfield in another case admits as much himself. It was as a matter of policy, as then understood, that the rule was probably adopted, it being then considered politic that no evidence should be admitted from parties interested. But since Lord Mansfield's time opinions have changed on this subject, and the tendency has been, and still is, to admit the evidence of all parties for what it may be worth. The Court has now to receive from parties, other than the husband and wife, evidence of facts and statements from which it may infer for or against the legitimacy of the child. But the mouths of the only two persons who can give evidence of a conclusive character (if credited) are absolutely closed. It is not suggested that the evidence of the husband or wife would be likely to be of an altogether satisfactory character. But it is not easy to see why it should not be admitted subject to the usual tests of cross-examination and to all necessary comment. In the large majority of cases it is conceived that such evidence would be more useful to, than subversive of, the ends of justice. Some attempts have from time to time been made to procure the admission of such evidence under sec. 3 of the Evidence Amendment Act, 1869, which provides that the evidence of a husband or wife is admissible in a "proceeding instituted in consequence of adultery." But after some conflict of judicial opinion, it seems now to be settled that such evidence is not admissible under that section to prove the illegitimacy of a child born in wedlock (see *Burnaby v.*

Baillie, sup.) The question is, however, one well deserving the attention of Parliament when next an Evidence Amendment Bill comes up for consideration.—*Law Times*.



The "Goodwill" of a Solicitor's Practice.—For general purposes, the goodwill of a business constitutes part of the partnership assets. It is the right of every partner, in the absence of agreement to the contrary, to have the goodwill sold, on dissolution of the partnership, for the common benefit of all parties interested. In such circumstances the rules applicable as between two individuals are to be taken to apply also to the sale by a retiring partner or a surviving partner, or the representatives of a deceased partner, to continuing or incoming partners, or to any other purchaser of the business of the firm, of his or their share of interest in the goodwill of the business. The supposition that on the death of a partner the goodwill survived, that is to say, passed with its full benefits to the surviving partners, has long since been exploded, although, of course, that result may be provided for by special agreement.

It is obvious, however, that the foregoing propositions can only be accepted in their entirety with respect to commercial partnerships. When applied to partnerships between professional men, the introduction of various qualifications at once becomes indispensable. In such a case the inherent difficulty of dealing with a thing so impalpable as "goodwill" is made especially apparent. "Goodwill" still remains a commercial rather than a legal term, and the thing itself, regarded as "the benefit arising from connection and reputation," or as "the probability of the old customers going to the new firm which has acquired the business," is often doubtful and sometimes delusive, where one solicitor bargains for the succession to the business of another practitioner. In *Arundell v. Bell* (49 L. T. Rep. N. S. 345) Jessel, M. R., said: "The first point which strikes one is, whether in the ordinary case of a partnership between solicitors there is any goodwill to sell. Now, in an ordinary case, especially where, as in this case, the offices do not belong to the firm, it is difficult to see what there is to sell. The practice of resorting to a

particular office is of very little use as regards solicitors, who change their offices, as we know, without detriment to their business. . . . Then you cannot sell the clients' papers, which are the most valuable things of all. A man often does get the papers of another solicitor, but it is illegal. When a solicitor is in possession of papers, he must take care of them for the client who has intrusted them to his custody. Therefore they cannot be sold. It may be quite true that, if a solicitor does do so, and hands over the papers, although it is illegal, the purchaser may get something by it; but that, of course, would not justify the act."

In an earlier case, indeed, *Austen v. Boys*, 27 L. J. 714, (Ch.), Lord Chelmsford, L. C., said: "The term 'goodwill' seems wholly inapplicable to the business of a solicitor, which has no legal existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs." It would be too strong, however, to take this dictum in its fullness. "Goodwill" in the case of a legal practice certainly means less than in connection with a commercial business. But it means something. The difficulty is to decide how much. In *James v. James & Bendall* (60 L. T. Rep. N. S. 569), some practical aspects of this difficult subject received careful consideration. Arrangements had been made for two solicitors to succeed to the business of Mr. James, senior, on his death, the widow (as her husband's executrix) being a party to the terms. The successors entered into partnership and took possession of all the deeds, books, and documents which belonged to or were in the possession of Mr. James at the time of his death. The executrix subsequently commenced an action to recover the deeds and other documents, claiming damages for their wrongful detention, and an injunction to restrain the defendants from dealing with or parting from any of the papers. The defence was, that the plaintiff had agreed to assign the goodwill of the deceased's business to the defendants, and that the assignment of the goodwill of a solicitor's business included the right to possession of such books, deeds, and papers as were necessary for preserving the business of the different clients, so far as the assignor had a right to possession.

By consent of the parties, all matters in dispute were referred to arbitration. The arbitrator ruled against the defendants as to any right to the papers unless expressly provided for; and application was made to the High Court to revoke the submission, on the ground that the arbitrator was wrong on the point referred to, and in rejecting evidence on the accepted meaning of "goodwill" on the transfer of a solicitor's business. On behalf of the defendants, reference was made to the definition given by Jessel, M. R., in *Ginesi v. Cooper & Co.* (42 L. T. Rep. N. S. 751), where his Lordship said: "'Goodwill,' I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." That, however, was a commercial case, and while it is certainly an advantage to a solicitor to possess the clients' papers which were held by his predecessor, it is an advantage of a sort which cannot be legally attained.

In discharging the rule which had been obtained by the defendants in *James v. James*, Mr. Justice Denman said: "The meaning of the word 'goodwill' does, no doubt, vary according to the subject-matter, and is frequently a question of fact. It has been clearly shown . . . that according to the opinion of the Court, which has been strongly pronounced in many cases, in the business of a solicitor the word 'goodwill' means less than in any other profession, because it is very difficult effectually to convey the goodwill . . . inasmuch as it is the result of personal confidence, which is liable to be changed at any time at the will of the client. The cases on the point appear to clearly establish the proposition that, in the absence of specific and definite stipulations, an assignment of the goodwill of a solicitor's business does not carry with it the right to the custody of the clients' deeds and papers. . . . There is nothing in the agreement to show that the goodwill includes the possession of the clients' deeds and papers, or that the defendants are in any other way

entitled to retain the custody of them." These are considerations which it behoves purchasers of legal practices to bear very carefully in mind. Moreover, it should be remembered that *Lambert v. Dawson* (L. Rep. 13 Eq. 322) has been overruled, and that by virtue of the decision in *Pearson v. Pearson* (27 Ch. Div. 145) the purchaser of a goodwill must be careful to strictly tie down the vendor, so as to guard against possible rivalry after completion of the purchase.—*Law Times*.

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Salvage and its Equities.—The recent wreck in Victorian waters of the *Craigburn* has given rise to a discussion in the press about salvage and hard bargains with shipmasters in distress; and as many of the correspondents seem to suffer from a want of lucidity on the subject, it may not be out of place to mention the principle which governs persons "who go down to the sea in ships" in such weather. In the first place, it must be noted that when a ship is in peril and a salvor approaches, whether in the shape of a steam-tug or otherwise, there is a sort of incompetence to contract from the very position of affairs. It is recognised that under such circumstances, if a contract were to be formed, the element of duress must necessarily enter to vitiate such contract; consequently "the title of salvors to reward is incompatible with the existence of legal duty or obligation at the time to render the service which is the foundation of their claim" (Maclachlan on Merchant Shipping). In other words, the reward of salvors is a reward not earned by them in the performance of any legal duty, and when assistance has been substantially given the ships assisted are fixed with a liability. "A salvor is a person who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the vessel" (*per* Lord Stawell, *The Neptune*, Clark, 1 Hagg. Ad. 227). This is the principle—that of doing more than one's duty calls upon one to perform—which guides the Courts in regarding with jealousy the claims of pilots and tug-owners to salvage reward, although neither

class is bound to engage for ordinary pilotage or towage with a vessel in distress; and if, while towage services are being rendered, "circumstances supervene involving serious danger that would justify the tug in abandoning her engagement, and she continues to render assistance, her services then become salvage services." It is plain, therefore, that as the parties are not in a position to enter into a contract, no "hard bargain," if actually made, is enforceable, and that though the ship is in distress it is practically at the mercy of the salvor; yet the sanction of the latter in case of refusal to render salvage services is the odium of all charitable people, a sanction considered quite sufficient hitherto to morally compel salvors to perform their moral, if not their legal duty. The matter, indeed, is a curious instance of the apparent conflict between moral and legal duty, the performance of which entitles the salvor to the liberality of the Courts. The amount of the reward, of course, cannot be minutely assured except by a nice consideration of the circumstances in each particular case, and therefore shipmasters in distress and salvors must be content to leave their liabilities and their claims to the adjustment of the Courts, which will decide according to the value of the property saved and the risk and peril attending the saving of it and the conduct of the salvors during the operation. In fact, the case is one of services arising out of a moral and not a legal duty, meeting with, not legal payment, but simply compensation or reward by the aid of the Courts. "In all cases, indeed, where duty springing from office, or arising out of contract, would have legally bound the claimants to do the services of the same nature as they have actually rendered, the Court is vigilant to protect the owners from improper claims, without neglecting what is required for the ends of justice and the encouragement of enterprise on such occasions" (MacLachlan, p. 573). Tug-owners therefore can freely send their vessel cruising on storm coasts, with the satisfaction of knowing that there is no necessity for unseemly bargaining with mariners whose lives are in peril, and that for services promptly and skilfully rendered, generous compensation in a court of law will be the natural result.—*Australian Law Times*.

Clumsy Legislation.—The custom of drawing Acts of Parliament by reference to or incorporation of portions of earlier statutes, in many cases partially repealed, is most unwise, and is continually being condemned from the Bench and in the press. But, notwithstanding the condemnation the practice has received, it still survives, with consequences which become more serious with the multiplication of statutory enactments. The bewildered practitioner, who is compelled to turn from statute to statute, from clause to clause, and too frequently to a mass of reported cases, in order to unravel the meaning of a new Act, and then only to fail in his task, has good reason to anathematise the silly system of legislating which prevails. The time of the judges is largely wasted in the often fruitless attempt to reconcile obviously contradictory enactments, the law is rendered uncertain and involved, and not only the cost of litigation, but litigation itself, is vastly increased. This possibly is the only point of view from which the legal practitioner can regard the practice of the parliamentary draftsmen with complacency; but, after all, Acts of Parliament are not framed in the interests of lawyers, but for the advantage of the public at large. The law should be rendered as little complex as it is possible to make it, and we do urge that a system of repeal and re-enactment should be substituted for that of reference and incorporation, to which those who are responsible for the framing of new measures seem to be so much addicted. One of the results of the practice is to defeat the very object of the Legislature in amending the law, the Courts being at times compelled by the irresistible force of logic to place interpretations upon new measures which are utterly inconsistent with their real object. Moreover, the multiplication of cross-references can but create confusion in the minds of members of Parliament when they have to consider the effect of fresh legislative proposals, and we are satisfied that Bills frequently pass through both Houses and receive the Royal assent only half understood by those who enact them. The task of interpretation is left to the lawyers. We are astonished that with so many members of the legal profession in both Houses of Parliament, who must be more or less acquainted with the evils to which we are referring, the system is allowed to be perpetuated.

It has been condemned over and over again, and Lord Blackburn, in a case which reached the House of Lords as a consequence of the practice (*Mayor of Portsmouth v. Smith*, L. R. 10 App. Cas. 371), took occasion to censure it in the following terms. His Lordship said: "It is a dangerous mode of draftsmanship to incorporate a section from a former Act; for, unless the draftsman has a much clearer recollection of the whole of the former Act than can always be expected, there is a great risk that something may be expressed which was not intended." It would be easy to quote many such utterances from the Bench in consideration of the custom, were it necessary to do so. The latest instance to which our attention has been drawn is that of the Housing of the Working Classes Act of last session. Part II. of that Act, which deals with unhealthy dwelling-houses, contains numerous provisions for the closing and demolition of insanitary dwellings, and sec. 32 enacts that "It shall be the duty of every local authority . . . to forthwith take proceedings against the owner or occupier for closing the dwelling-house under the enactments set out in the third schedule to this Act." A reference to that schedule shows that two other statutes have to be consulted in order to find out what are the powers of the local authority, viz. the Sanitary Act of 1866, sec. 21, and the Nuisances Removal Act, 1855, secs. 8, 12, and 13. Now sec. 12 of the latter Act provides for the local authority, upon complaint to a justice, obtaining a summons "requiring the owner" to do certain things. It is not necessary for our purpose to specify what those things are. Our point has reference to the interpretation of the word "owner," which it will be observed appears in the section of the Act of last session to which we have referred, and in the above section of the Act of 1855. What is to be understood by the word owner? Is it to be taken in the sense of the 1855 Act, or in the sense of the Act of 1890? That this is a real difficulty will readily be perceived. Before we can ascertain what the powers of the local authority are in reference to the particular matters dealt with in sec. 32 of the Act of last session, we must turn to sec. 12 of the Act of 1855. That section uses the word "owner," and it is only reasonable to suppose that in any proceedings taken under the section the

word should bear the meaning which the statute in which the section occurs attaches to it. This meaning is to be found in sec. 2 (the interpretation clause), where we learn that "the word 'owner' includes any person receiving the rent of the property in respect of which that word is used, from the occupier of such property on his own account." Consequently under the 12th section of the Act of 1855 a lessee or sub-lessee for a term of years, no matter what the length of the term might be, was the owner within the meaning of the Act. So far so good; but when we turn to the interpretation clause of the Act of 1890 we find that the word "owner" does not bear the same meaning. According to that statute "the expression 'owner' . . . includes all lessees or mortgagees of any property required to be dealt with under this part of this Act, except persons holding or entitled to the rents and profits of such premises for a term of years, of which twenty-one years do not remain unexpired." This definition clearly excludes all lessees who have not an unexpired term of twenty-one years, and is utterly inconsistent with the definition of the word "owner" contained in the Act of 1855. Here is an instance of the difficulties which arise in the interpretation of Acts of Parliament incorporating or referring to portions of other enactments. The Housing of the Working Classes Act, 1890, bristles with difficulties of the kind of which we have spoken, and litigation is certain to ensue before the point of what is an owner within the meaning of sec. 32 is finally decided. A repeal of the sections in the Act of 1855, and their embodiment in the new Act, would have saved the difficulty; but the pernicious practice upon which we have animadverted has been permitted to prevail. What we have said is sufficient to illustrate the objectionable character of the system, and we trust that the lawyers in Parliament will use their influence to terminate a method of legislation which has absolutely nothing to recommend it, and which the experience of every judge on the bench, and every practising barrister, compels him to condemn.—*Law Times*.

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Unqualified Persons acting as Solicitors.—Re Louis, ex parte The Incorporated Law Society, of which a report is presented

in last Saturday's *Law Times*, is an interesting case on an interesting subject, and members of the second branch of the profession in particular may well expect that the decision should not be permitted to pass without being brought under their notice in the fullest detail. It was an application, by way of motion on the part of the English Incorporated Law Society, for a writ of attachment under 23 & 24 Vict. c. 127, sec. 26, against Adolphus H. Louis, an alleged unqualified person, for contempt of court, for having acted as a solicitor contrary to sec. 2 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), by preparing and settling an affidavit used upon an application for an order for substituted service of a writ in an action in the High Court. Coming before Mathew and Day, JJ., in the Queen's Bench Division, it appeared that the defendant carried on business in London, under the name of "Flowerdew & Co.," as a law stationer, confidential agent, and process-server. The defendant issued a circular, in which he set out various charges for serving process, and stated that "the charge for substituted service includes the necessary attendance and expenses. The affidavit is prepared and sworn gratis." And further, "Applications for substituted service made upon the affidavits of Messrs. F. & Co. are almost invariably successful." Now, sec. 2 of 6 & 7 Vict. c. 73, provides that "No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit or defend, any action, suit, or other proceeding in the name of any other person, or in his own name, in any court, etc., or act as an attorney or solicitor in any cause, matter, or suit, etc., unless admitted and enrolled, and otherwise duly qualified to act as an attorney or solicitor." While, under sec. 26 of 23 & 24 Vict. c. 127, it is enacted that "Every person who acts as an attorney or solicitor contrary to sec. 2 of 6 & 7 Vict. c. 73, etc., shall be deemed guilty of a contempt of the court in which the action, etc., in relation to which he so acts is brought, and may be punished accordingly." And again, sec. 60 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), says that "Any person who not being a . . . certificated attorney, solicitor, etc., draws or prepares any instrument relating to real or personal estate, or any proceedings in law or equity,

shall forfeit the sum of £50." Here the contention on the part of the Law Society was that the defendant was liable to attachment for contempt of court under 23 & 24 Vict. c. 127, sec. 26, and had also been guilty of "acting as a solicitor" within 6 & 7 Vict. c. 73, sec. 2, inasmuch as he had settled an affidavit in support of an *ex parte* application for substituted service, which was the proper work of solicitors, and none but the solicitor in the case or his clerk ought to be allowed to do so. He was also, it was submitted, liable to a penalty under sec. 60 of the Stamp Act of 1870, in that, being an unqualified person, he had drawn or prepared an instrument relating to proceedings in law or equity. And *Law Society v. Shaw & Waterlow* (46 L. T. N. S. 187, 49 *id.* 141, 9 Q. B. Div. 1, 8 App. Cas. 407) was referred to, where Brett, L. J., treated the preparation of affidavits as essentially the work of a solicitor. On the other hand, for the defendant it was contended that he had not acted as a solicitor, but only as a process-server. If, it was urged, the contention of the Law Society as to the Stamp Act were correct, the drawing up of affidavits by the solicitor's clerk would be an illegal act. It was not denied that an affidavit of service may be made by one who is not a solicitor; but it was said that in the case of substituted service the affidavit must be drawn by a solicitor. What had been done here was that, in settling the affidavit, the defendant was acting for the solicitor by whom he was employed, and was not himself acting as a solicitor. Defendant's practice was to issue writs under the instructions of the solicitor who employed him; he did not act on his own behalf as a solicitor.

Both judges were of opinion that the motion should be dismissed. "It is said," observed Mathew, J., "that he has 'acted as a solicitor' within the meaning of 6 & 7 Vict. c. 73, sec. 2. That section specifies certain acts which no one is to be permitted to do unless he be a solicitor, and adds, 'or act as an attorney or solicitor in any cause, matter, or suit.' It is not contended that the defendant has committed any of the specific acts which are prohibited by the section, but it is contended that he has 'acted as a solicitor' within the general words. It appears that he has been carrying on the business of a process-server,—we are not concerned with his trans-

actions in any other capacity,—and that he has carried on this business in entire good faith, and has been employed by solicitors of undoubted respectability. It appears also that it has been part of his duty in his employment as a process-server, when a writ has been served, and when there has been a failure to effect service of a writ, to prepare in each case the usual affidavit for the use of the solicitor by whom he has been employed. This has been the course of business. Now, in the preparation of the affidavit of service, where the service has been effected, can it be said that the defendant has acted as a solicitor? The learned counsel for the Law Society hesitated as to this, and with reason, because as regards this affidavit it is plain that the defendant has acted, not as a solicitor, but for a solicitor and as a witness. Then can any reasonable distinction be drawn between the case where an affidavit of service is made and the case where an affidavit is made of the facts showing why personal service was not effected? The learned counsel for the Law Society urged that, in the latter case, it is necessary to have the assistance of a solicitor, in order that there may be a proper cross-examination of the person who states the facts with respect to the failure to effect personal service. But how could there be any effective cross-examination in such a case? The solicitor could only act upon the statement of the person employed to serve the process: and here, in the place of the old process served with its strange proceedings, we have a person of undoubted respectability and character, who may be expected to employ only persons on whom reliance can be placed. In this case, therefore, as in the other, as it appears to me, the defendant has acted for a solicitor, and in the capacity of a witness. It was not disputed that if, in place of the affidavit being produced, the person employed to effect service were himself to state at chambers what had occurred, there could be no pretence for saying that in so doing he was acting as a solicitor. I think that the defendant, in settling this affidavit, did no more than make such a statement, and I cannot think that any additional security would have been afforded by his having had the assistance of a solicitor in the preparation of the affidavit. No single case has been referred to in which an affidavit prepared by the defendant has been

used at chambers otherwise than by or on behalf of a solicitor, and the solicitor who makes use of such an affidavit is responsible for so doing, and is bound to satisfy himself before he uses it that the statements which it contains are, so far as he knows, true. I think, therefore, that no contempt of court has been committed. The result is, that the motion will be dismissed with costs."—*Irish Law Times*.



The Bar and the People.—The protest against "lawyers' rule," which is one of the features of the Farmers' Alliance movement, is worthy of a certain amount of consideration. The feeling of jealousy against the bar as a professional sect has come to the surface before the present time. Several years ago an evening newspaper in this city, now defunct, but which then had a good circulation, carried on a crusade for a considerable period against the preponderating influence of lawyers in moulding legislation. Lawyers have always largely outnumbered members of any other calling in Congress and the State assemblies. It was charged then, as it is now, that they use their official station primarily to advance the interest of their profession, and not for the good of the people at large.

As a matter of fact, there never has been much real basis for criticism of this kind. In his chapter on "The Bar," in *The American Commonwealth*, Mr. Bryce observes that American lawyers "soon acquired professional habits and a corporate spirit similar to that of their brethren of England." But this author remarks that "the disposition to simplify and popularise law, to make it less of a mystery, and bring it more within the reach of an average citizen, which is strong in modern Europe, is, of course, still stronger in a colony, and naturally tended in America to lessen the corporate exclusiveness of the legal profession, and do away with the antiquated rules which had governed it in England." The direct contract between practitioners of all grades and their clients, and the absolute dependence of the lawyer upon the approval of his clients, or of his constituents if he be a legislator, have prevented the growing up of a class feeling strong enough to be of substantial benefit to the profession, either financially or socially. Indeed, the complaint is often made even by

laymen, that there is too little professional feeling in this country. American lawyers are prone to employ very much the same methods that prevail in the mercantile world. Outside of the largest cities they advertise in newspapers, and in the great centres their competition for business is sharp, and carried on with very little sentiment. Lawyers in Congress and the legislatures are quite as eager as laymen to catch any breath of public sentiment and have the credit of introducing popular measures. It would be a great benefit to the community if professional conscience or pride uniformly prevented lawyers from advocating demagogic measures.

A proposition that legislation should be seriously attempted without the consent, advice, and supervision of lawyers, would be akin to the suggestion that the Department of Public Health be managed without the aid of physicians, or that public surveys be made by men ignorant of mathematics. John Stuart Mill called attention to the "need of a legislative commission, as a permanent part of the constitution of a free country, consisting of a small number of highly-trained political minds, on whom, when Parliament has determined that a law shall be made, the task of making it should be devolved; Parliament retaining the power of passing or rejecting the Bill when drawn up, but not of altering it otherwise than by sending proposed amendments to be dealt with by the commission." Very much the function proposed for such a commission is now discharged in Congress and all our legislatures by the standing committees, and in the framing of new laws the services of lawyers are absolutely indispensable, not only to secure appropriate phraseology, but to bring the fresh provisions into harmonious relations with the existing body of jurisprudence. The fruits of any session of a legislature in which the virtuous and inspired farmer had been left to his own devices would constitute valuable contributions to *Life* or *London Punch*.

But while in this country the bar is actually very close to the people, and does not exert as strong an independent influence as often would be desirable, there is just enough superficial force in the criticisms of the "embattled farmers" to make one or two suggestions timely. The first is that while the law has largely ceased to be a "mystery" and has

been brought more "within the reach of the average citizen" than it used to be, the further popularisation of the knowledge of legal terminology and procedure will be an advantage both to the people and the profession. There is still on the side of the people some distrust of what many considered an utterly artificial system, whose technical terms consist of bad English and worse Latin. It does not do much good to point out how much more unintelligent and technical pleadings and processes formerly were; to the average man they seem sufficiently mystifying at present. It is well, therefore, for members of the bar to take the trouble to explain on all proper occasions to laymen, in colloquial language, the nature and bearing of legal questions which arise in any individual's experience, or which attract attention in the public prints. Our experience has been that laymen are uniformly interested in these subjects, and are grateful for information that enables them to comprehend a controversy in the courts. The court reports which are now appearing in the *Evening Post* cannot be too highly commended on this score. They are not made up of sensational and quasi-criminal cases, as has too often been the practice of newspapers heretofore. They give accounts of civil cases which are important from a business point of view, in such language that the general reader can grasp the issues on the merits. News of this character has a highly educational value, and will contribute materially to the final extinction of the old barrier of distrust between the bar and the people.

Our second suggestion may be introduced by an anecdote. A gentleman, upon suddenly entering the office of a celebrated physician, discovered him prancing about like a colt, and otherwise manifesting intense hilarity and exultation. Upon inquiring for the cause of such an exhibition from one usually the most dignified of men, the doctor shouted, "Mr. — did die of ossification of the heart." The learned gentleman had been called in consultation upon a case that baffled many other members of the faculty. He had diagnosed the disease as above stated, and all his associates had flatly disagreed with him. He had just received word that the autopsy had borne out his theory, and was "celebrating." We think that sometimes there is danger that members of the Bar will look

upon legal controversies too much from what may be termed the pathological standpoint, forgetting that they aim to be patriotic citizens as well as acute lawyers. If an adroit rascal succeeds in enriching himself at others' expense, while keeping technically within the law, it is natural to admire the professional cleverness that guided him, and there is a tendency to overlook all objections on moral grounds. If a man deserving to go to State's prison escapes through a defect in the law, or an error in the trial, while a conscientious member of the bar should always desire to see the law administered without fear or favour, yet he should certainly join other good citizens in their regret over the present mis-carriage of justice, and their efforts to have the loophole closed in the future.

Outside of, and in addition to, the formal standards of professional ethics, lawyers should see to it that their private consciences and progressive instincts are as active as their neighbours'. Jurisprudence is, and probably always will be, a system of many practical imperfections, and nothing would do more to keep the bar and the people apart than a general disposition on the part of its members to argue that whatever is, is right.—*New York Law Journal*.

Reviews.

The Administration of the Public Health Act in Counties. By JOHN SKELTON, C.B., LL.D., Advocate, Secretary of the Board of Supervision. Edinburgh: Blackwood & Sons. 1891.

THE fact that this little book is the third publication which Mr. Skelton has issued on the subject of Public Health since the passing of the Local Government (Scotland) Act, 1889, is enough to show the impetus given to sanitary administration by that Act. It is satisfactory to learn from so competent an authority that the new arrangements promise to work well. The policy of the Act clearly was to secure for sanitary administration the services of men of the highest scientific skill. The regulations of the Secretary for Scotland, and of the Board of Supervision, contained in this little book, un-

doubtedly carry out that policy, and one cannot have much sympathy with local authorities who do not loyally second the efforts of these high authorities. The matter which bulks most largely in the book is the appointment and tenure of medical officers and sanitary inspectors; and one notices the curious anomaly under which police burghs are assessed for the salaries of the county sanitary officials, without apparently receiving any benefit from them. The position of these county officials is certainly peculiar, there being no such appointments contemplated by the Public Health Act. But, by attention to the judicious suggestions of the Board of Supervision, local authorities will doubtless secure that all their officials shall work together for the efficient administration of this most important branch of county business. To all who are concerned or interested in the subject, Mr. Skelton's book will be most useful, acquainting us, as it does, with the latest developments of the law of sanitary administration.

Die Tierquälerei in der Strafgesetzgebung des In- und Auslandes, historisch, dogmatisch und kritisch dargestellt, nebst Vorschlägen zur Abänderung des Reichsrechts. Von Dr. Jur. ROBERT VON HIPPEL, Privat-dozent an der Universität zu Kiel. Berlin: Otto Liebmann. 1891.

IN the work under notice, Dr. Von Hippel of Kiel gives us a very exhaustive treatise on the subject of cruelty to animals, in the penal law not only of Germany, but of all the other civilised States. The book is a most valuable compendium of the legislation on the subject. The first part of the work is devoted to the law of the German States. In the second part there is an account of the position of legislation in England (*sic*), France, Belgium, Luxemburg, Italy, the Netherlands, Norway, Sweden, Denmark, Finland, Austria, Russia, Switzerland, Spain, Portugal, Servia, Greece, the United States, Canada, South America, and Australia; and, in the Appendix, the British, Swiss, North American, and Australian enactments for the prevention of cruelty to animals are set out at length. The author critically examines the whole question, which is one raising many delicate points, and he gives suggestions for the reform of the existing law.

English Decisions.

JUNE—JULY.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

TRADE NAME.—*Name of Company—Use of proper name of Company together with a name calculated to deceive.*—This was a motion by the Army and Navy Co-operative Society Limited, generally known as the "Army and Navy Stores," and having its principal place of business in London, and a branch establishment at Bombay, for an interim injunction to restrain the Army and Navy and Civil Service Co-operative Society of India Limited, who carried on business in India, from carrying on their business so as to mislead the public into the belief that they were dealing with the plaintiff company. The defendants sold "Army and Navy" claret in bottles, of which the labels and capsules showed the full title of the defendants, but the corks were stamped with that title, omitting the words "and Civil Service." *Held* (by Mr. Justice Kekewich), that a man is not entitled, by placing his own proper name upon his goods, so that it may be seen by those who use them, to use a name which used elsewhere would be calculated to deceive: that the words "Army and Navy" being the distinctive words of the plaintiff's name, there was reasonable ground for anticipating confusion of the defendants with the plaintiffs, and that the injunction must be granted.—*The Army and Navy Co-operative Society Limited v. The Army and Navy and Civil Service Co-operative Society of India Limited*, High Ct., Ch. Div., 5 June.

BUILDING SOCIETY.—*Borrowing in excess of limit—Agent—Personal liability of directors—Building Societies Act 1874 (37 & 38 Vict. c. 42).*—By the certified rules of a building society money might be received on deposit or loan up to a prescribed amount. With the knowledge and concurrence of the directors, advertisements were issued by the secretary inviting the public to lend money to the society. The money advanced to the society was paid to the secretary, who then gave an acknowledgment of the payment, with an intimation that a formal receipt would be given at a later date signed by two of the directors. This formal receipt was given in every case by some two of the directors, who thereby acknowledged the receipt of the money on behalf of the society. The secretary in many cases filled up the amount on the counterfoil of the receipt-book as considerably less than the amount actually received, though the receipt itself contained the right amount. By this means the secretary misappropriated to his own use a large amount of money, and upon his absconding it was found that the society had borrowed a sum considerably in excess of the amount allowed by its rules. The depositors who had advanced money to the society after it had exceeded its borrowing powers sought to

make the directors personally liable. *Held* (by Mr. Justice Mathew), that, as the directors were cognisant of the course of business pursued by the secretary, although they were ignorant of the frauds perpetrated by him, and as they held him out to the public as their agent, they were therefore personally liable for the amounts advanced to the society in excess of its borrowing powers.—*Cross and Others v. Fisher and Others*, High Ct., Q. B. Div., 6 June.

ARBITRATION.—*Award—Costs—Submission before the Act—Arbitration after the Act—Power of arbitrator to award costs—Arbitration Act 1889 (52 & 53 Vict. c. 49), secs. 2, 25.*—By the Arbitration Act 1889 (52 & 53 Vict. c. 49), sec. 2, "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to this Act, so far as they are applicable to the reference under the submission." Provision (i) of the schedule is, "The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner those costs or any part thereof shall be paid." Sec. 25 provides that "this Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act." An arbitration was held, after the commencement of the Act, under a submission entered into before the commencement of the Act. The submission did not give the arbitrators any power to award costs, but costs were awarded to the successful party. Upon a motion by one of the parties to the arbitration, to set aside or refer back the award on the ground that the arbitrators had exceeded their jurisdiction in awarding costs against the applicant, the Divisional Court held that the arbitrators had no power to award costs. The successful party in the arbitration appealed. *Held* (by the Master of the Rolls and Lords Justices Lopes and Kay), that, by virtue of sec. 25, the provisions of sec. 2 and all the provisions of the first schedule applied to an arbitration commenced after the Act under a submission made before the Act, and that the arbitrators had power to award costs.—*Re Arbitration between Williams and Stepney*, Ct. of App., 8 June.

MANDAMUS.—*Officer in service of the Crown—Secretary of State for War—Royal Warrant.*—This was an application by Colonel Edward Mitchell, a retired lieutenant-colonel of the Royal Engineers, calling on the Secretary of State for War to show cause why a writ of *mandamus* should not issue commanding him to consider and determine, under the terms of a Royal Warrant issued in 1884, what was a just equivalent for any loss the applicant might have incurred by the operation of any Royal Warrant of a later date than July 4, 1872. Colonel Mitchell entered the army in 1855. Under the then conditions of service he had an option of retiring on a pension of £600 per annum after thirty years' service, provided there was a vacancy and he had become a colonel or major

general. He also had the right to continue to serve on full pay as long as his health and conduct was satisfactory, till he reached the rank of major-general. By art. 80 of the Royal Warrant of 1884, a lieutenant-colonel in the Royal Engineers should be placed on half-pay after five years' service. By art. 978, "An officer who held rank not below that of major in our Royal Engineers on the 30th September 1877, and who shall retire from our army after having been removed from the regimental position of lieutenant-colonel under art. 80, shall be granted such an addition to his retired pay . . . as our Secretary of State shall consider a just equivalent with reference to any loss such officer may have incurred by the operation of any of our warrants of a later date than July 4, 1872." Colonel Mitchell retired, and was granted in addition to his retired pay a sum of £150 per annum compensation for loss, but this sum he alleged was not "a just equivalent" which the Secretary of State was bound to fix. The Secretary of State refused to entertain the matter further, and a rule for a *mandamus* was obtained. *Held* (by the Master of the Rolls and Lord Justice Kay), that the rule must be discharged; the Secretary of State's only duty was to the Crown, and he had none towards the applicant. Decision of the Queen's Bench Division affirmed.—*Reg. v. Her Majesty's Secretary of State for War*, Ct. of App., 9 June.

SHIPPING.—*Classification by Lloyds*—*Right of purchaser to an action against Lloyds.*—The defendants are the chairman and committee of Lloyds' Register, and are the executive body of certain persons associated together as a society for the purpose of obtaining an accurate classification of the shipping of the United Kingdom, and for that purpose the committee by their surveyors survey and superintend the construction and building of ships of all descriptions, and have reports made to them by such surveyors, and enter such ships in their registers in accordance with such reports, and issue certificates of character of such ships signed by the chairman of the committee of classification and countersigned by the secretary of the general committee, for which surveys and certificates the committee make charges to the owners of the ships. In the month of September 1889, the plaintiff, as he set out in his statement of claim, purchased the yacht from the then owner, and he alleged that he was induced to make this purchase by a certificate issued by the committee, which represented that the yacht was classed and entered in the yacht register with the character A 1 for eleven years, and had been built under special survey, and that she was built of ten and twelve years' materials. The plaintiff alleged that the yacht was far inferior to what the certificate described, and that he had given a much higher price for the yacht than he would have done if the certificate had properly described the yacht. The question of law raised was whether, assuming the facts alleged by the plaintiff in his statement of claim to be all true, there was any cause of action disclosed therein; that is, whether the plaintiff, who had purchased the yacht from the owner for whom the survey

had been made, had any right of action against the defendants for an improper or negligent survey, made not for him but for the owner from whom he purchased. *Held* (by Mr. Justice Denman and Mr. Justice Wills), on principle and on the authority of the case of *Braginton v. Chapman and Others* (Trustees of Lloyds' Register), reported in the *Shipping Gazette*, June 1, 1878, that the defendants had committed no breach of duty as against the plaintiff for which an action would lie.—*Thiodon v. Tindall and Others*, High Ct., Q. B. Div., 9 June.

TRUSTEE.—*Encumbrances on trust fund by cestui que trust*.—*Duty of trustee to give information*.—*Honest mistake of trustee*.—*Liability*.—An inquiry was made of one of several trustees asking what funds the *cestui que trust* was interested in, and whether the trustees held or knew of any mortgage on the life interest of the *cestui que trust* therein. The trustee replied that he held no mortgage, but the life interest was charged with the payment of a certain sum for interest on money advanced to the *cestui que trust*, and with certain sums for premiums on policies on his life which were mortgaged to the trustees. At that time several charges on the life interest of the *cestui que trust* existed, six of which were recited in the deed by which the defendant was appointed trustee, though he did not remember them at the date of his reply. The *cestui que trust* then mortgaged his life interest to the plaintiff, but the mortgage afterwards proved valueless in consequence of the number of prior charges, and the plaintiff then brought this action to compel the defendant to indemnify him. *Held* (by Lords Justices Lindley, Bowen, and Kay), that it was not a case of warranty, the plaintiff and defendant not being contracting parties; that there was no fraud or breach of duty on the part of the defendant; that there was nothing in the defendant's letters which entitled the plaintiff to relief on the ground of estoppel, and therefore it would be inconsistent with *Derry v. Peek* (14 App. Cas. 337) to grant the plaintiff any relief.—*Low v. Bouverie*, Ct. of App., 11 June.

LIFE INSURANCE.—*No insurable interest*.—*Fraud by agent of company*.—An action was brought to recover back from the defendants premiums paid by the plaintiff to them upon certain policies of life insurance, which the plaintiff said he was induced to enter into by the fraudulent representations of agents of the company. He alleged that he was induced by the fraudulent representations of an agent of the company to take out a policy of insurance on the life of a person in whom he had no insurable interest, and his case was that in 1888 an agent of the company asked the plaintiff to insure himself or wife, and then said, "Have you not an old uncle?" The plaintiff replied that he had; then the agent said, "We will take him; you can insure him and have 'covering policies' when you approach the completion of your premiums." The plaintiff assented, and took out one policy of £12 at 2s. a week. In 1889 the plaintiff took out a second policy for £10 at 2s. a week, and in the same year took out a third policy for £5 at 1s. a week, and he paid all the

premiums on these policies. The company then refused to grant any further policy. The plaintiff stated in his evidence that the agent told him, "You will always keep your money by adding fresh policies." Altogether the plaintiff had paid in these premiums £27, 14s. In January last, when the last premium was paid, the plaintiff applied for a further policy, but they refused to grant any more, though they had given him notice that if he did not pay the premiums he would lose the policies. The plaintiff's uncle had not asked the plaintiff to insure his life, and the plaintiff himself paid the premiums. The defendants relied upon the fact that the agent had exceeded his authority, and that the plaintiff was aware of it. The county court judge gave judgment for the plaintiff for the whole amount claimed. It was now contended on behalf of the company that the agent had no authority, and that the contracts were illegal, and that therefore the plaintiff could not recover. *Held* (by Mr. Justice Cave and Mr. Justice Charles), that there was a fraud by the agent of the company, and that by means of that fraud the money had come into the possession of the company, and that they were bound to refund it.—*Brook v. The Refuge Assurance Company*, High Ct., Q. B. Div., 11 June.

WILL.—*Construction*—"Our" children.—Testator, who died in 1884, by his will, made in 1872, gave all his property "to my wife for life, and after our death amongst our children." The will was written on a lithographed common form, and "our" was substituted by the testator for "my," which latter word originally stood in the form before "children." The testator, a bachelor, had married, in 1869, a widow, with children who survived the testator, and also survived their mother, who died intestate in 1889. There were no children of the marriage. The children of the wife claimed the testator's property, which consisted of personal estate, as against nephews and nieces, the next of kin. *Held* (by Mr. Justice Chitty), that the gift was to the testator's children by his wife; and, as there were none, the gift failed.—*Re Baynham; Hart v. Mackenzie*, High Ct., Ch. Div., 11 June.

COMPANY.—*Winding-up*—*Balance order*—*Action for debt*—*Companies Act*, 1862 (25 & 26 Vict. c. 89), secs. 101, 102, 106, 120.—In March 1889, F. was settled upon the list of contributories of the company in respect of 200 shares. On the 7th May 1889 a balance order was made against F. for £884, 8s. 1d., in respect of money due on allotment and calls. The calls were made before the date of the winding-up order. This order could not be served upon F., because he was out of the jurisdiction. The liquidator then obtained leave to issue a writ, and a specially indorsed writ was issued on the 29th September 1890 for the amount, and leave was given to serve the writ on F. out of the jurisdiction. A sum of £965, 14s. was paid into Court by F., and he obtained leave to defend. The defence was that the allotment and calls were invalid, because the directors were not duly appointed or qualified, and alternatively the company were not entitled to sue on a balance order; and the

defendant counter-claimed to have his name erased from the list of contributories. The plaintiff, in reply, pleaded delay and acquiescence; it was also contended on his behalf that the action was not an action to enforce a balance, but an action to recover a debt. *Held* (by Lords Justices Lindley, Bowen, and Fry), that the balance order had not operated as a merger of the debt, and was not a bar to the action; *held* also, that, on the merits, the defendant was rightly placed on the list of contributories.—*Westmoreland Green and Blue Slate Company v. Fielden*, Ct. of App., 12 June.

LICENSING ACTS.—*New tenant—Right to apply for renewal of licence—Grant of licence until next 10th October—Second application—Jurisdiction of justices—Licensing Act, 1828 (9 Geo. IV. c. 61), sec. 14.*—The Licensing Act, 1828 (9 Geo. IV. c. 61), sec. 14, provides that, "If any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in the licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail to be drunk or consumed in such house, it shall be lawful for the justices assembled as aforesaid at a special session holden under the authority of this Act, to grant . . . to any new tenant of any house having so become unoccupied . . . a licence to sell excisable liquors by retail to be drunk or consumed therein, provided always that every such licence shall continue in force only from the day on which it shall be granted until the 10th day of October then next ensuing." J., who was the duly licensed tenant of a certain beerhouse, and was about to give up possession of the premises, did not apply for a renewal of his licence at the general annual licensing meeting, which was held on the 30th August 1890. On the 2nd September J. gave up possession, and R. entered into occupation of the house as tenant. On the 27th September R. applied at a special session for a grant to him under the above section 14, as the new tenant of the house, of a licence until the ensuing 10th October, which was granted. On the same day, the 27th September, an adjourned general annual licensing meeting was held, at which R. did not apply for a renewal of the licence from the next 10th October. On the 3rd January 1891 R. applied at special sessions for a grant, under the same section 14, of a second licence until the 10th October 1891. The justices refused the application on the ground that R. was not then a "new tenant" within the meaning of the section, and that they had no jurisdiction. R. then obtained a rule *nisi* for a *mandamus* to the justices to hear and determine his application, which was subsequently, after argument, discharged by a divisional court. The applicant appealed. *Held* (by Lords Justices Lopes and Kay), that inasmuch as R. might have applied at the adjourned general annual licensing meeting on the 27th September for a renewal of the licence from the 10th October, but had neglected to do so, he could not

apply after the 10th October for a second grant to himself as a new tenant of a licence until the 10th October 1891.—*Reg. v. Powell and Others, Justices of Swansea, Ct. of App.*, 12 June.

COMPANY.—*Winding-up petition—Resolution for voluntary winding-up—Second petition—Creditor's right to compulsory winding-up—Companies Act, 1862, sec. 145—Companies (Winding-up) Act, 1890, secs. 8, 9.*—On the 18th April 1891, H., a judgment creditor, presented a petition to wind up a company. On the 1st May the company passed a resolution to wind up voluntarily, which was duly confirmed on the 20th May. On the 28th May, K., another creditor, presented another petition, alleging that there were many transactions in the history of the company which specially needed investigation, and claimed a compulsory order. He also alleged that the first petition was collusive. At the hearing H. consented to accept a supervision order. A number of creditors appeared, but they were about equally divided between opposition and support of the compulsory order. A large majority of shareholders opposed a compulsory order. It was urged at the hearing that the better means of investigating any fraudulent transactions relating to the company which are given in case of a compulsory winding-up, afforded grounds for making a compulsory order which did not exist before the Act. *Held* (by Mr. Justice North), that there was nothing in the Act of 1890 to relieve a creditor who desired a compulsory order from the burden of showing, as required by sec. 145 of the Companies Act, 1862, that his rights would be prejudiced by a voluntary winding-up. K. had not done this, and there was no reason for ignoring the wishes of the majority of shareholders. K.'s petition must be dismissed with costs. A supervision order was made on H.'s petition.—*Re Russell, Cordner, & Co.*, High Ct., Ch. Div., 13 June.

COMPANY.—*Contributory—Director—Qualification shares—Allotment—Notice—Reasonable time within which to qualify.*—A summons was taken out by I., asking that his name might be removed from the list of contributories of a company in respect of forty £5 shares on which nothing had been paid. The company was registered on the 22nd October 1888. On the 25th October 1888, I. was appointed one of the directors of the company. The articles of association provided that each director should hold at least forty shares in the company. By the minutes of a directors' meeting for the 25th October 1888, at which I. was not present, it appeared that forty shares were allotted to I. His name was placed on the register of shareholders in respect of those shares before he acted as director. I. never applied for any shares, and stated that he did not know till the company was wound up that any shares had been allotted to him, or that his name had been placed on the register of shareholders in respect of the shares allotted to him. He first acted as director by attending a meeting on the 24th November 1888, when he was elected as chairman. He presided at subsequent meetings of the directors, one of which was on the 16th January 1889, and another

on the 18th January 1889. He acquired forty fully paid-up shares on the 19th January 1889, which were duly transferred to him and registered in his name. On the 28th January 1889 he retired from the board of directors. A petition was presented in January 1890, and the company was ordered to be wound up. I. was then placed upon the list of contributories in respect of the forty shares originally allotted to him. It was decided by Mr. Justice North that the reasonable time for acquiring qualification shares expired so soon as a director had acted; and that I., having no other shares than the unpaid shares at the time he first acted as director, and his name being on the register with respect to those shares, had notice of his being on the register so as to bind him to have agreed to take the shares. Accordingly his Lordship refused to order I.'s name to be removed from the list of contributories in respect of the forty shares which had been allotted to him on the 25th October 1888. *Held* (by Lords Justices Lindley, Bowen, and Fry), without deciding that the mere circumstance that shares were standing in the name of a director was notice to him of the fact that shares had been allotted to him, the Court would for the present purpose assume that I. did not know that the shares were standing in his name, but that he must be taken to have known that it was his duty to qualify by acquiring forty shares as required by the articles of association; that I. was bound to qualify within a reasonable time, and that if a reasonable time had not actually elapsed by the 24th November 1888, then it certainly had before the meetings in January 1889; therefore that I. was not entitled to have the register rectified, and his name struck off the list of contributories. —*Re The Portuguese Consolidated Copper Mines, Limited; Ex parte Inchiquin*, Ct. of App., 15 June.

COMPANIES ACTS.—*Registration—Partnership of seven persons—Partnership formed for winding-up old partnership—Right to register such partnership—Mandamus—Companies Act, 1862 (25 & 26 Vict. c. 89), secs. 6, 180.*—Rule for a *mandamus* to the Registrar of Joint-Stock Companies to compel him to register a certain company, which he refused to register as not being a joint-stock company within the meaning of the Companies Act, 1862. The surviving partner in the old-established firm of W. H. Allen & Co. desired to form the firm into a limited company, and with that object he and six others executed a deed for that purpose, and became, in fact, a partnership consisting of seven members, the object of this partnership being to wind up the affairs of the firm of W. H. Allen & Co. This partnership then applied to the Registrar of Joint-Stock Companies to register them, but the registrar refused to register the partnership, on the ground that it was not a company within the meaning of the Companies Act, not having a capital divided into shares. This decision of the registrar was taken at the instance of the Board of Trade, who had given instructions that these partnerships ought not to be registered, as not coming within the scope of the Companies Acts. This rule for a *mandamus* was then obtained to compel

the registration of the partnership as a company. Sec. 6 of the Companies Act, 1862, provides that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability." Sec. 18 provides that "... any company hereafter formed in pursuance of any Act of Parliament other than this Act or of letters patent, ... or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee, and no such registration shall be invalid by reason that it has taken place with a view to the company being wound-up." It was contended against this rule that such a partnership was not a company, that it was not a company "duly constituted by law" within the meaning of sec. 180, and that this partnership was not a *bona fide* partnership, but that its object was merely the winding-up of the firm of W. H. Allen & Co. *Cur. adv. vult.* Held (by Mr. Justice Cave and Mr. Justice Charles), that all the objections urged against the registration of this partnership fail, and that the partnership is entitled to be registered as a company under the Act.—*Reg. v. The Registrar of Joint-Stock Companies*, High Ct., Q. B. Div., 17 June.

COMPANIES.—*Rectification of register—Winding-up order by Court—Purchase of shares after order—Right of purchaser of shares to be inserted on register as a member—Companies Act, 1862 (25 & 26 Vict. c. 89), sec. 35.*—This was an appeal from Darlington County Court, which had refused an application for an order directing the liquidator of the Onward Building Society to place on the register of members the name of the appellant, Mr. Broad. The society had been ordered to be wound up compulsorily, and the question was, whether the appellant Broad, who had purchased shares after the date of the winding-up order, was entitled, under sec. 35 of the Companies Act, 1862, to have his name substituted in the register for that of his vendor. The society had been unable to fulfil its engagements, and an order had been made by the Court for its compulsory winding up, but the assets turned out to be more than sufficient to meet all liabilities, and it appeared that a considerable surplus would remain for distribution among the members. Under these circumstances the appellant applied to the County Court to have his name registered as owner of the shares in the place of his vendor. The question now was, whether this alteration could be made in the register in respect of shares bought after the date of the winding-up order. Sec. 35 of the Act provides that, if the name of any person is, without sufficient cause, entered in or omitted from the list of members, that person may apply for an order of the Court that the register may be rectified, and the Court may make an order for the rectification of the register accordingly, and may decide any question necessary for the rectification of the register.

Sec. 87 provides that, when a winding-up order has been made, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court. The learned judge held that he had no jurisdiction to make the order under sec. 35, and the applicant appealed. For the appellant it was contended that the statute did not prohibit dealing in shares after the order had been made by the Court, and that, under sec. 35, the purchaser of shares after the winding-up order was entitled as of right to have the register rectified, and his name inserted in the list of members. For the respondent (the liquidator of the company) it was contended that the intention of the statute was clear, that, after the order for winding up by the Court had been made, the provisions of sec. 35 did not enable a member to alter his status as a contributory. *Held* (by the Lord Chief-Justice and Mr. Justice Mathew), that the appellant, having purchased his shares after the date of the winding-up order, was not entitled to have his name registered in respect thereof, there being no power under the 35th section to make this rectification.—*Re The Onward Building Society*, High Ct., Q. B. Div., 22 June.

WILL—Administration—Specific legacy—Gift of residue of real and personal estate—Trustees of residue also executors—Right of trustees to deduct statute-barred debt from share of residue.—A testator appointed his wife and son trustees and executors of his will, and after making various specific bequests to four of his sons, H., W., J., and G., devised and bequeathed all his residuary real and personal estate to his trustees upon trust to sell and convert the same into money, and out of the proceeds to pay the testator's debts and funeral and testamentary expenses, and the pecuniary legacies, and to hold the net proceeds as to three-sevenths thereof upon certain trusts for his son E. and his two daughters and their issue, and to pay the remaining four-sevenths to the testator's sons, H., W., J., and G., in equal shares as tenants in common. At the date of the testator's death, E., H., W., and J. were indebted to him in various sums, for which he held their I O U's; these debts had, however, become barred by the Statute of Limitations. The trustees claimed the right of deducting from the specific legacies and devises to these sons, and also from their respective shares in the residue, the amounts which were so due from them to the estate. The residue consisted both of realty and personality. *Held* (by Mr. Justice Kekewich), that the trustees were not entitled to deduct the statute-barred debts from the specific legacies and devises; that in the division of the residue the debt due from any beneficiary must, for the purposes of computation, be included in the residue, and treated as part of the share of residue going to such beneficiary.—*Re Akerman*; *Akerman v. Akerman*, High Ct., Ch. Div., 2 July.

COPYRIGHT.—International Copyright Act, 1886 (49 & 50 Vict. c. 33), sec. 6—Work produced abroad—Not registered in this country—Publication in this country—Rights or interests of publisher.—The appellant, Mayeur, a French composer, wrote a musical composition

which was first produced by him in Paris in November 1877, but he took no steps to acquire the copyright of the piece in this country. In March 1887 the respondent purchased the score of the music from a publisher in England, and shortly afterwards had it performed by his band. By the International Copyright Act, 1886, a foreign author can acquire in this country the same rights and remedies as an author in this country, as soon as an Order in Council applies the Act to the country of the author, "provided that where any person before the date of the publication of an Order in Council lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date." An Order in Council applied the above to France on the 6th December 1887. *Held* (by Lords Justices Lindley, Fry, and Lopes), that the respondent had an interest arising from or in connection with the production of the piece which was subsisting and valuable at the date of the Order in Council.—*Moul & Mayeur v. Groenings*, Ct. of App., 3 July.

SHIPPING. — *Charter-party—Demurrage—Strike—Lay days—Cargo to be received as fast as vessel can deliver, not less than 100 standards a day.*—The plaintiffs shipped a cargo of timber on board the defendants' steamship under a charter-party for the carriage of the cargo from Quebec to London. By clause 7 the ship was to deliver her cargo afloat in London, but no time was fixed for delivery. Clause 13 was as follows: "Cargo to be furnished and received by ship at port of loading as fast as vessel can receive in ordinary working hours, and to be received from alongside ship at port of discharge, as customary, as fast as steamer can deliver in ordinary working hours, Sundays always excepted loading or discharging. Not less than 100 standards a day loading or discharging, and ten days on demurrage over and above the said laying days at £70 per day." A standard was 165 cubic feet of timber. The vessel arrived at the docks on the 19th August 1889, and was ready to discharge on the 20th. The plaintiffs alleged that barges engaged on their behalf were alongside the vessel ready to take delivery, that being the extent of the merchant's duty, it being the duty of the ship to put the timber over the side into the lighters or rafts and stow it; but that the ship did not fulfil this duty. By the custom of the port of London the ship had to engage a stevedore, who supplied men to discharge, and these men struck on the 21st, and the crew of the ship were also unable or unwilling to work. Nothing was done until the 3rd September. Between that date and the 16th some portions of the cargo were put out by the crew. At the latter date the strike ended; but through delay, for which, the plaintiffs contended the defendants were responsible, the ship was not finally discharged till the 28th. The vessel contained about 1000 standards, and in the ordinary course would have been unloaded by the 30th August. The plaintiffs claimed damages for delay in the delivery of their cargo and for detention of barges, and

repayment of a sum of £280 paid by them under protest in respect of demurrage. The defendants denied the alleged breach of charter-party, and pleaded that the plaintiffs were not ready to do their part in taking delivery of the cargo, and claimed the £280 in respect of four days' demurrage. At the trial of the action, before Mr. Justice Wills and a special jury, on the 11th of April 1891, the jury found (1) that three days were lost between the 16th and the 28th September in discharging by reason of the stevedore's work being improperly done; (2) that one day was lost between the same dates by reason of absence of lighters, or lightermen, or raftsmen; and (3) that the charges in respect of detention of barges were reasonably incurred. *Held* (by Lords Justices Lindley, Fry, and Lopes), that the words "not less than 100 standards a day" were a provision in favour of the cargo-owners, and that its effect was to make it obligatory on the ship to deliver not less than 100 standards a day, the interests of the shipowners as to rate of loading and discharge being amply protected by the other terms of the clause; and that the defendants were entitled to one day's demurrage.—*Dobell & Co. v. Watts, Ward, & Co.*, Ct. of App., 3 July.

COMPANY—*Liquidation—Stay of execution—Jurisdiction—Companies Act, 1862 (25 & 26 Vict. c. 89), sec. 122.*—This was a motion for a stay of execution pending an appeal against the order of Mr. Justice North in the case of *Re Queensland Mercantile and Agency Company; Ex parte Australasian Investment Company; Ex parte Union Bank of Australia*, reported (1891) 1 Ch. Div. 536, by which the claim of the Australasian Investment Company against the Queensland Mercantile and Agency Company, which was in liquidation, was held to be prior to the claim of the Union Bank of Australia against the last-mentioned company. The order was made on the 14th January 1891, but the minutes of the order were not finally settled until the 19th June 1891, and on that day the Union Bank of Australia gave to the Australasian Investment Company notice of appeal against that order. The Union Bank of Australia now moved that execution and all other proceedings by the Australasian Investment Company under the order of the 14th January 1891 might be stayed until after the hearing of the bank's appeal from that order. The Australasian Investment Company is a Scotch company, and it was contended in support of the motion that there might be some difficulty in enforcing the order of the Court of Appeal, if in favour of the Union Bank of Australia with respect to the property of the Queensland Mercantile and Agency Company, against the Australasian Investment Company without recourse to the Scotch courts, if the last-mentioned company were allowed to obtain payment of the moneys held to be due to them in priority to the Union Bank of Australia, by the order of the 14th January 1891, before the appeal of the bank could be heard, and that sec. 122 of the Companies Act, 1862, by virtue of which an order made by the Court in England in the course of the winding-up of a company can be enforced in Scotland, applied to the company being

wound up, but had no application as against the Australasian Investment Company, under the circumstances of the case. In the course of the argument Mr. Justice North referred to his judgment in the case of the *Howe Machine Company; Fontaine's case* (41 Ch. Div. 118), and stated that, if sec. 122 of the Companies Act, 1862, had been brought to his notice on the hearing of that case, he should have decided differently. *Held* (by Mr. Justice North), on the authority of *Bradford v. Young; Re Fulconer's Trusts*, 28 Ch. Div. 18; *Barker v. Lavery*, 14 Q. B. Div. 769; and *The Annot Lyle*, 11 P. Div. 114, that a stay of execution was not granted except on the ground of special circumstances; that sec. 122 of the Companies Act, 1862, would apply to the Australasian Investment Company; that there were no special circumstances in the case; and that the motion must be dismissed with costs.—*Re The Queensland Mercantile and Agency Company Limited*, High Ct., Ch. Div., 3 July.

EASEMENT.—*Right of way—Mortgage of servient tenement—Implied reservation—Will—Devise—Implied grant.*—A. was the owner of two adjoining houses and premises, one of which she occupied herself; the other was let to a tenant. A. mortgaged the latter house and premises to secure a sum of money. Prior to the mortgage A. had a right of way from her own house through a passage which ran over and along the side of the garden of the mortgaged premises into a street at the rear. There was no reservation in the mortgage deed of the right of way, which was not a way of necessity, and was used only from time to time and not continuously by A. By her will A. devised the house and premises which she herself occupied to the plaintiff's predecessor in title. The mortgaged premises she devised to the defendant. The will contained no words descriptive of or appropriate to the right of way. At the death of A. the mortgage was still subsisting. The plaintiff brought an action against the defendant to recover damages for his trespass in stopping up the passage and preventing its use by the plaintiff. It was decided by Mr. Justice Smith and Mr. Justice Grantham, first, that the right of way, not being a way of necessity, and not being expressly reserved to A., the mortgagor, was extinguished by the mortgage; and, secondly, that the right of way, being an easement used from time to time only, and not a continuous easement, did not pass to the plaintiff's predecessor in title under the will, there being no appropriate words of grant; and that, therefore, the action was not maintainable. The plaintiff appealed. *Held* (by Lords Justices Lindley, Fry, and Lopes), that, assuming in the appellant's favour the easement did pass to the appellant's predecessor in title, without actually deciding that point, yet the right of way, not being a way of necessity nor expressly reserved, was extinguished by the mortgage, and that therefore the appeal failed; but that the decision would be without prejudice to the appellant's right to redeem the mortgage.—*Taws v. Knowles*, Ct. of App., 6 July.

SHIPPING.—*Bill of lading—Hypothecation notes—Delivery order—*

Property in goods.—C., a merchant at Bristol, imported goods from H. & Co., in Canada, the course of business between them being that H. & Co. shipped the goods to this country, receiving bills of lading made out to their order. These bills of lading, together with bills of exchange drawn by them on C., were sold by H. & Co. to various Canadian banks, who in turn remitted them to banks in this country with a document called an hypothecation note. By the terms of this hypothecation note the banks here might retain the bills of lading until payment of the bills of exchange, if they were not satisfied with C.'s acceptances. C. was a customer of the plaintiffs' bank, and in the months of October and November 1890 he expected the plaintiffs to pay his acceptances in respect of the several consignments of goods imported by them in the way referred to. This the plaintiffs did, receiving the bills of lading for the shipments from the holders of the acceptances. The consignments in question, on arrival in this country, had for the convenience of all concerned been warehoused by the shipowners at the defendants' warehouses in Bristol, for delivery by them against the shipowners' delivery orders. Shortly before the plaintiffs had paid C.'s acceptances for him, he had, by the negligence of the defendants' servants, succeeded in getting possession of a large quantity of the goods from the defendants' warehouses without presenting any delivery orders. In December 1890 C. became insolvent. Thereupon the plaintiffs, having obtained delivery orders from the shipowners, presented them to the defendants and demanded delivery of the goods. Upon the defendants failing to deliver the goods which C. had irregularly obtained, the plaintiffs brought an action against the defendants to recover the value of the goods. Lord Coleridge gave judgment for the plaintiffs. On appeal by the defendants the main contention was, that the wrongful act of the defendants, if any, having been done before the plaintiffs acquired any title to the goods, such act did not afford them any cause of action. For the plaintiffs it was, on the other hand, contended that, so long as the bills of lading were outstanding, they represented the goods, and the plaintiffs being the holders of the bills of lading, were the owners of the goods; and that therefore the delivery to C. was wrongful. *Held* (by Lords Justices Lindley, Fry, and Lopes), that the reasons of Wightman, J., in *Goodman v. Boycott*, he being the senior judge, ought to prevail, especially as Willes, J., in *Short v. Simpson* (L. Rep. 1 C. P. 248), had expressed his concurrence in that view, and it was consistent with that adopted in the Scotch case of *Pyrie v. Warden* (3 Sco. Sess. Cas. 9th ser. 523).—*Bristol and West of England Bank v. Midland Railway Company*, Ct. of App., 7 July.

All communications for the Editor to be addressed to the care of the publishers, MESSRS. T. & T. CLARK 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

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Editorial.

The Late Lord Justice-General.—Since Lord Stair died, Scotland has not lost so able a jurist as the late Lord President Inglis. As has been well said, the genius of law was in him. His mind was one of large general powers; he would have risen to eminence in any walk of life—as it chanced, he distinguished himself in several. But his lordship was a born lawyer. Law was his congenial field, and his services to Scottish Jurisprudence cannot be over-estimated. There is no branch of Scots Law in which he has not left in the recorded decisions his lucid, penetrating, and unambiguous views. There is no branch of it on which he has not thrown new light. He was head and shoulders above any Scottish lawyer of his time—those who came nearest to him will be the most ready to acknowledge his pre-eminence. In the vicissitudes of political parties, it does not always happen that the head of a Court by virtue of office is also its leader by virtue of learning and intellect. By admission of all, this desirable state of matters existed in the Supreme Court of Scotland during the presidency of the late Lord Justice-General.

* * *

Legal Patronage.—The present Government cannot complain that fate has not given them their full share of legal

patronage. Since Lord Salisbury took office in July 1886—but five years ago—his colleagues have almost remanned the judicial staff in Scotland. Not to mention minor appointments and mere promotions, vacancies caused by death or resignation have occurred, we should be inclined to say, almost without precedent. Of the thirteen judges who constituted the Supreme Court in July 1886, only six still remain. Seven judgeships, including the Presidentships in both Divisions, have thus become vacant within the five years. Four of these were occasioned by death, and three by resignation. Lord Fraser, Lord Craighill, Lord Lee, and Lord Justice-General Inglis died in harness. The resignations were those of Lord Moncreiff (Lord Justice-Clerk), Lord Shand, and Lord Mure (who has since died). At the time we write, the office of Lord Justice-General has not, of course, been filled up; but the appointments to the six vacancies on the Bench were those of Lord Kingsburgh (Lord Justice-Clerk), and Lords Wellwood, Kyllachy, Kincairney, Stormonth-Darling, and Low. In the inferior Courts, also, patronage has been unusually plentiful during the present administration. Leaving out of account those rendered vacant by promotion to the Bench, four Sheriff-Principalships have fallen to the Government—including those of the metropolitan counties both of the East and the West. The deaths of Sheriff Clark, Sheriff Crichton, and Sheriff Muirhead, and the resignation of Sheriff Macpherson, have occasioned these. In the matter of Sheriff-Substituteships, their appointments have been proportionately numerous. Again leaving out of account posts which became vacant through transference, the Government have already had to fill up ten Sheriff-Substituteships as the result, direct or indirect, of death or resignation; and, in addition, the Sheriff-Substituteship at Selkirk is still vacant. The ten appointments were—Mr. D. J. Mackenzie, to Lerwick; Mr. Armour, to Kirkwall; Mr. J. P. Grant, to Elgin; Mr. Russell Bell, to Campbeltown; Mr. J. Campbell Shairp, to Inveraray; Mr. Henderson Begg, to Greenock; Mr. Donald Davidson, solicitor, to Stornoway; Mr. George Watson, to Newton-Stewart; Mr. W. D. Lyell, to Kirkcudbright; and Mr. Mark Davidson, to Hamilton. The ancient office of Lyon King-of-Arms also fell into their gift by the death of Mr. George Burnett, and

Mr. J. Balfour Paul was appointed. Lord Salisbury's Government have also had to appoint a Queen's Remembrancer (Mr. Reginald Macleod), consequent on Mr. J. J. Reid's death; a Professor of Public Law in Edinburgh University (Sir Ludovic Grant, Bart.), consequent on the death of Professor Lorimer; and a Professor of Scots Law in Glasgow University (Mr. Moody Stuart).



Our Barbarous Terminology.—Where it is possible to avoid it, one ought not to use big words. *Item*, one ought as little as may be to use technical words. *Item*, in days of cheap international postage, one ought to avoid the use of local terms. Consistently we have striven in our modest pages to observe these three rules, but we have not always succeeded in the case of the latter two. That is but human. Our ill-success in that direction has been brought home to us strikingly of late. In the June number of this journal, we published some humorous verses (to which were affixed the initials J. L. R.) on "The Fate of the Postponed *Fiar*." The term *Fiar*, as familiar to Scottish lawyers as any term in all the language, and a well-understood word with every layman in this barbarous northern country of ours, has proved too much for distant editors. The leading law magazine in Great Britain, for example, *The Law Quarterly Review*, edited by Sir Frederick Pollock, reproduces the title of these verses as "The Fate of the Postponed *Fiat*." This title is ingenious. It may even be an improvement, provided that one does not read the verses—in which case it might seem not so appropriate as that which the author himself selected. Across the Atlantic also, a magazine has considered it to be its editorial duty to reform this perplexing title. The "*Fiar*" of the author conveying no meaning of any kind to the good people out there, and the "*Fiat*" of Sir Frederick Pollock having a nasty, pedantic, Latin sound, the *New Jersey Law Journal* (which, by the way, makes us a Glasgow publication) hits on the happy expedient of re-naming the verses, "The Fate of the Postponed *Trial*." Here we have an instance of that enterprising and daring spirit which has made the United States great, and that power of disregarding *minutiæ*, and

fixing attention only on the truly important, which enables the different and differing States of the American Republic to remain a united body !



Caps Optional.— Few lawyers, and fewer masters and mistresses, will consider sound law or common sense the judgment given in the Westminster County Court in the case of *Chappell v. Kennedy*. Kennedy was master and "Miss" Chappell was maid. Not unreasonably he required her to wear caps while in his service. Miss Chappell refused. Apparently she is one of those persons who covet the transient glory of being mistaken for a daughter of the house for a passing moment or two. Or, perhaps, she may be a valorous reformer, and the forerunner of a tumultuous revolution, in which female Tappertits shall trample upon employers. Her motives, however, in no way affect the bad law of the judge. Miss Chappell's master dismissed Miss Chappell from his service because she declined to submit to this menial (but becoming) badge. Whereupon Miss Chappell sued Kennedy for nine days' wages—and won ! We should have thought that a clearer case of violation of implied obligation in contract never arose. A butler might as warrantably claim the right to wear a green tie, or a coachman to drive the carriage dressed in a dressing-gown. We should be surprised to see the decision followed.



A Travelling Editor.—The editor of an American law periodical, *The Albany Law Journal*, has been on tour in the unknown land of Europe, and he has published his impressions of that backward region in his magazine. The impressions, it may be observed, have nothing to do with law. They do not even mention the tribunals, or the wigs and gowns, or the forensic peculiarities of Europeans. The traveller is a lawyer, and his journal is written for lawyers. Yet the administration of justice is never once referred to. He devotes much space to Englishwomen, their want of taste in dress, and the size of their hands—in connection with which we are informed that the

editor's daughter takes five-and-a-half's in gloves, and that that lady could not find a pair of her size in London! And, with characteristic modesty, this observant editor remarks that "whenever you see a very pretty woman, either in England or France, you are safe to bet she is American." For a turnout of fashion, Rotten Row is nothing in comparison with the Bois in Paris; but the "establishments are not on the whole so elegant and showy in either as in Central Park"! This Ulysses seems to have missed many of his home comforts while in our hemisphere. Some he does not mention, but we can imagine the awful though secret agony it must have caused him to suppress his yearning to spit indiscriminately and incessantly, in dangerous proximity to the skirts of the peerless beauties aforesaid. Some he does mention. He laments the want of rocking-chairs and iced water (at what season in this climate could any one but a fever patient have a craving for iced water?); he never tasted "a decent piece of roast beef in London"; the barbers are barbaric (*sic*), charge too much, rise too late, and jar on the refined American ear by dropping their "h's." And so forth. *C'est magnifique, mais ce n'est pas*—very appropriate in a law journal.



A Distinguished Trio.—Three distinguished men who have died recently—distinguished, that is, in other branches of life—were by training lawyers. The late Sir John Macdonald, Premier of Canada, was called to the Bar of Upper Canada in 1836; Mr. Russell Lowell, the genial and gifted American diplomatist and brilliant man of letters, also began life in the legal profession; and the late Mr. Cecil Raikes, the able and successful Postmaster-General of Lord Salisbury's Cabinet, who died on 24th August, was a barrister of the Middle Temple and a bencher of that Inn.

Special Articles.

PAROCHIAL SETTLEMENT AS EFFECTED BY ORDERS OF THE BOUNDARY COMMISSIONERS.

By Part VII. of the Local Government (Scotland) Act, 1889 (secs. 44—51), provision is made for the appointment of Boundary Commissioners with a view to the simplification of administrative areas. The duties imposed on the Commissioners with respect to parishes made it necessary that in certain cases they should transfer an area from one parish to another, and, where such transference is made, the Act declares that "such alterations shall have effect for all purposes, whether . . . Parochial Board, School Board, Local Authority, or other, save as hereinafter provided" (sec. 49, sub-sec. 1). These saving words relate to ecclesiastical and parliamentary arrangements, and need not be further referred to. Clearly, then, an order of the Boundary Commissioners, transferring the district of O from the parish of A to the parish of B, has the effect of removing that district from the jurisdiction of the Parochial Board of A in matters of poor law, etc., and of the School Board of A in matters of education, and of placing it under the jurisdiction of the Parochial and School Boards of B. The mere alteration of administrative area is a comparatively simple matter. The inspector of poor for the parish of B must look after the district of O, instead of the inspector for A. Births, marriages, and deaths occurring in O must be registered with the registrar of B, instead of with the registrar of A. Children of school age can now claim admission as of right, not to the schools of A, but to those of B; and B School Board must take the place of A School Board in dealing with defaulting parents who reside in O. The ratepayers of O are assessed for poor and school rates, no longer by the authorities of A, but by the authorities of B. But in dealing with poor-law administration, the further question necessarily arises as to the effect of the transference on the settlement of paupers. How are the statutory rules

to be applied in determining the settlement of those who were born or reside in the district transferred?

The question has already arisen in a form in which it might have received judicial decision, but, unfortunately, as we think, the Court has declined to deal with it. By sec. 50 of the Local Government (Scotland) Act, 1889, authorities affected by orders of the Boundary Commissioners are empowered to make agreements for the adjustment of their property, income, debts, liabilities, and expenses, so far as affected by such orders; and, in default of agreement, such adjustment may be made by the Commissioners. The Commissioners are further empowered to state a special case on any question of law for the opinion of either Division of the Inner House of the Court of Session. It became necessary to take advantage of these provisions in the case of the parishes of Borthwick and Temple.

The parish of Temple had a detached part situated at Gorebridge, and adjoining the parish of Borthwick. By an order made by the Commissioners, this detached part (which, for the sake of brevity, we shall call Gorebridge) was declared from and after 15th May 1891 to cease to be part of the parish of Temple, and to form part of the parish of Borthwick. After that date a man who had acquired a residential settlement in the parish of Temple by residence in Gorebridge became chargeable as a pauper. Temple Parochial Board maintained that as he had acquired his settlement in a district which, at the time of chargeability, formed part of the parish of Borthwick, it fell upon Borthwick Parochial Board to relieve him. Borthwick Parochial Board maintained that the pauper having acquired a settlement in the parish of Temple could lose that settlement only by the requisite period of non-residence, and that a person residing in Gorebridge could obtain a settlement in Borthwick only by residing there for five years, according to the usual rules governing residential settlement. This dispute came before the Boundary Commissioners in the course of proceedings for a financial adjustment between the Parochial Boards of the two parishes. At the request of the parties, the Commissioners stated a Special Case in which these facts were set forth, and the opinion of the First Division of the Court of

Session requested on the question of settlement thus raised. The Court, on advising, dismissed the case, on the ground that there was no question of law involved. With the utmost respect for the opinion of the learned judges, we cannot but consider this decision a most unfortunate one. The grounds for dissatisfaction with the judgment will best be brought out, if we deal with the question as a question of law, with the view of determining whether it cannot be properly and reasonably decided on an interpretation of the statutory rules which govern settlement. If we establish that it can be so decided, the *ratio* of the Court's decision disappears.

At the outset, it is necessary to realise what exactly is effected by an order transferring the district of O from the parish of A to the parish of B. The duties of administration are transferred. For all parochial purposes (except ecclesiastical), the district of O becomes an integral part of the parish of B. Accordingly, rates are paid to the parochial authorities of B, and, generally, whatever civil rights and duties attach to residence in a parish are exigible from and due to these authorities. The parochial authorities of A cease to have any jurisdiction in the district of O, simply because it is no longer part of the parish of A. But it must be observed that this transference, while it affects current income and expenses, cannot, apart from special provision, affect property or liabilities attaching to the Parochial Board at the date of the transference. Such property and liabilities are vested in and due by the parochial authorities on behalf of the parish as a whole. A parish is an indivisible administrative unit. You cannot apportion rights and liabilities among the various areas which go to form it. When a part of a parish is cut off, it does not carry with it a proportionate part of the existing property, debts, and liabilities of the parish. The one parish certainly will lose and the other will receive a proportionate amount of rates for the future and there is a proportionate transfer of administrative duties; but (apart from statute) the property and the liabilities vested in the parochial authorities as corporate bodies at or prior to the date of transference remain unaffected by the transference. The

School Board of A, for instance, while it loses the rates of O and ceases to have any duties in respect of that district, does not by force of the order alone obtain relief from any portion of its existing debt. It cannot continue to assess O for payment of that debt, because O is no longer in its school district. On the other hand, the ratepayers of O cannot claim any interest in the school buildings vested in the School Board of A, or in any privileges attaching to residence in the school district of A. It seems hardly necessary to elaborate this argument. It receives an excellent illustration in the scheme of the Local Government (Scotland) Act. By that Act the administrative duties of the previously existing county bodies were by one section transferred to the newly established County Councils. But it required a separate series of sections to transfer the property and debts of the old county authorities to the new body. If the section transferring administration had stood alone, the old authorities would have been left with all the property and liabilities which were theirs at the date of the transfer. An order of the Boundary Commissioners simply transfers the administration of a specified area from one authority to another. It requires a separate process to transfer any part of the property or debts of either of the authorities affected to the other. So far, therefore, as the order alone is concerned, and apart from adjustments under section 50, every parochial authority retains all property and liabilities vested in it at or prior to the date of the transference. The phraseology of section 50 illustrates this, for, while that section provides for the adjustment of "property, income, debts, liabilities, and expenses," the chief power conferred is that of providing for the transfer or retention of "property, debts, and liabilities." It is clearly inferred that the order itself has the effect only of transferring current "income" and "expenses."

Now the law of settlement does not deal with the administrative machinery of the poor law, but is concerned solely with questions of liability between parishes. It lays down certain arbitrary rules, by means of which Parochial Boards may ascertain what paupers they are legally bound to relieve. Approaching the question from this side, and reverting to the concrete instance set forth in the Special Case above

referred to, let us consider the various liabilities attaching to the parishes of Borthwick and Temple at 15th May 1891 (the date of transference), in respect of the detached part of Temple which is now transferred to Borthwick, and which we have called Gorebridge. It appears plain that at the date of transference, Borthwick had no liabilities whatever in respect of Gorebridge. Temple, on the other hand, was liable to support all paupers then chargeable, who had been born in Gorebridge, or who had acquired a residential settlement by residence there. It is clear that the support of these paupers was a liability or debt of the parish of Temple, just in the same way as any property vested in the Parochial Board was an asset of the parish of Temple. Neither the debt nor the property is affected by the order. Since a pauper can do nothing to change his place of settlement so long as he remains chargeable, the paupers above referred to must remain burdens on the parish of Temple, at least during the present period of chargeability. But, in addition to these actual liabilities, the parish of Temple had a great many contingent liabilities at 15th May 1891. Every one born in Gorebridge prior to that date had a birth settlement in the parish of Temple, and might become chargeable as a pauper at any moment. So, too, might any one who had acquired a residential settlement in the parish of Temple by residence in Gorebridge. Is there any principle on which these contingent liabilities can be dealt with in a different manner from liabilities actually accrued? We know of none. Suppose that Temple Parochial Board had incurred debt which took the form of a life annuity. Every future year's payment is a contingent liability, and yet no one will contend that any part of that liability would, by the order alone, be transferred from Temple to Borthwick. It seems to us clear on principle that the parish of Temple is in every way as liable for its contingent as for its actual liabilities as these existed at 15th May 1891, and, apart from principle, the definition of "liabilities" in sec. 105 of the Local Government (Scotland) Act seems to settle the matter beyond question. It declares "liabilities" to include, *inter alia*, "all liabilities to which any authority . . . would be, but for the passing of this Act, liable or subject, whether accrued due at the date of the transfer by this Act effected, or

subsequently accruing." If this view be sound, the question is simply solved. Every one born in Gorebridge prior to 15th May 1891 has a birth settlement in Temple, and every one who at that date had a residential settlement in Temple by virtue of residence in Gorebridge retains that residential settlement until it is lost by non-residence for the requisite period in the parish of Temple (as altered in area).

The only method in which this reasoning can be set aside is by arguing that it is legitimate to trace a person's settlement, not only to a parish, but to this or that particular spot within the parish. Such reasoning is entirely fallacious, and is in no way warranted by the statutes regulating the law of settlement. Throughout the statutes the parish is the unit area. For instance, 1579, cap. 74, provides that the beggars of the parish are to be sustained by the parish; that a register is to be made of all aged poor, impotent, and decayed persons born within the parish, or having had their most common resort in the parish for seven years by-past; and that all poor people shall, within a specified period, return to the parish of their birth, or where they had their most common resort for seven years by-past. It is unnecessary to trace the law through all the statutes. In every case the parish is the unit area of settlement, and no smaller area is regarded. Accordingly, a person born in Gorebridge prior to 15th May 1891 obtained thereby a birth settlement, not in Gorebridge, not in any particular house, but simply in the parish of Temple. It is just as clear that a person born in Gorebridge after 15th May 1891 obtains a settlement, not in Gorebridge, but in the parish of Borthwick. So long as the fact of birth in the parish is established, the Court cannot ask for more. It cannot require proof that the birth took place in this or that part of the parish. In many cases the proof depends on entries in old Registers of Baptisms, which may specify the parish of birth, but not the precise place of birth within the parish. Yet this proof otherwise supported would be sufficient. In the case of a person born in Gorebridge prior to 15th May 1891, it is plainly irrelevant to inquire whether Gorebridge is or is not in the parish of Temple at the date of that person's chargeability. It is just as irrelevant to introduce any argument *ab inconvenienti*. Every question of settlement

falls to be decided, purely according to the interpretation of the statutes. All the Court can ask is whether the pauper was born in the parish of Temple. It is not relevant to ask whether the house in the parish of Temple in which the pauper was born, has now come to be situated in the parish of Borthwick. To maintain that the transference of Gorebridge from Temple to Borthwick carries to Borthwick the birth settlement of all who were born in Gorebridge prior to the date of transference, is as warrantable as to say that a child born in a travelling caravan changes his settlement with every parish into which the caravan goes. The broad requirement of the statutes is, that in a question of birth settlement you must establish in what parish the pauper was born. The transference of an area from one parish to another does not interpose the slightest difficulty. Every one born in Gorebridge before 15th May 1891 was born in the parish of Temple, and every one born there subsequently is born in the parish of Borthwick.

If this reasoning is sound, any question of settlement by residence can readily be solved on the same broad principles. The law as it now stands provides that continuous residence for five years in one parish without begging or being in receipt of parochial relief creates a residential settlement, which, until lost, supersedes the birth settlement. A residential settlement is lost by absence from the parish of residence for four years and a day, or, in the phraseology of the statute, by failure to reside for at least one year in the parish of residential settlement during any subsequent period of five years. Here, again, the parish is the unit. The residence must be, not in one and the same house, not in one and the same village, but simply in the same parish. A man might acquire a residential settlement though he lived during the requisite period in fifty different houses one after the other, if only they were in the same parish. Here again, therefore, the question simply is, In what parish did the pauper reside during the period in which he acquired his residential settlement? In the case set forth in the Special Case, the industrial settlement had been obtained by residence in Gorebridge for the requisite period prior to the date of transfer. There is no question that the residence in Gore-

bridge during the required period actually was residence in the parish of Temple, and therefore the settlement is in that parish. No order of the Boundary Commissioners could make it true that a man who lived in Gorebridge for five years prior to 15th May 1891 lived in the parish of Borthwick. It would be as true to say that he lived in the parish of Ardnamurchan. He lived during these five years in the parish of Temple, and that fact is by the statutes made conclusive in fixing his settlement.

Let us test this reasoning by taking an imaginary case, which, though it may seem extreme, will serve to illustrate the question. Suppose that by a landslip a large area of ground on the border of one parish was carried over part of another, burying part of the second parish beneath it. Suppose that the houses and occupants of the land thus transferred were uninjured, and that it was possible to lay down the boundaries between the parishes along the same line on the map as previously. Neither parish would be altered in area, but there would be a violent transference of certain land and houses with their occupants from one parish to the other. Could it be for a moment argued that there was any doubt or difficulty as to the settlement of people who resided on the transported area? It would simply be held that though residing in the same houses, they had ceased to reside in parish A, and had begun to reside in parish B. If, therefore, they had had a residential settlement in A, they would retain it till they had resided four years and a day out of A. If they were in course of acquiring a residential settlement in A, that power would immediately stop, and they would begin to acquire one in B. They might have resided four years 364 days in A prior to the date of the landslip, but that would avail nothing. They would have failed to acquire a settlement in A, and they would have to reside five years more (always, it is assumed, in the same house) before acquiring a settlement in B.

Now, is there any difficulty in applying the same considerations to the case of a legislative transfer? The orders of the Boundary Commissioners, when confirmed, have the effect of an Act of Parliament. Accordingly, the state of matters is that their order creates what might be called a statutory landslip.

The Legislature has transferred Gorebridge from Temple to Borthwick. Is not this precisely the same as if all the residents in Gorebridge had removed out of the parish of Temple into the parish of Borthwick? We are unable to see any distinction. The result will be, that each Gorebridge pauper claiming a residential settlement in Temple must have resided somewhere in the parish of Temple for five years prior to 15th May 1891. Take the case of a person who has been, and will be, continuously resident in Gorebridge. If he was born in Gorebridge prior to 15th May 1891, his birth settlement will always be in the parish of Temple; but he will begin at that date to build up the period of residence necessary to acquire a residential settlement in Borthwick, which he may do by 15th May 1896. If he had a settlement by residence in Temple at 15th May 1891, he will at that date begin the period of non-residence, and on 16th May 1895 he will have lost his residential settlement in Temple, and his birth settlement will revive. But by 15th May 1896 he will have acquired a residential settlement in Borthwick. If he had only begun to build up a period of residence so as to give him a residential settlement in Temple, that process will at once cease, and he must simply begin anew to build up a period of residence so as to give him a residential settlement in Borthwick.

It is no doubt startling, at first sight, that two persons born in the same house in Gorebridge, one before and the other after 15th May 1891, should have different birth settlements, and that a person might reside for more than nine years in the same house in Gorebridge, and yet have a settlement neither in Temple nor in Borthwick. But there is nothing inconsistent with principle in holding these positions, and there is nothing more incongruous in them than in the fact that, as matters stand under the existing law, two persons born in different parts of the same house may have different birth settlements, or in the fact that a man who lives $4\frac{1}{2}$ years on one side of a street and then $4\frac{1}{2}$ years on the other should have a settlement by residence in neither of the two parishes in which the street is situated. The difference between the actual cases last put and those which, it is contended, result from the Commissioners' order, is not a differ-

ence in principle, but only in degree. The argument *ab inconvenienti* would equally apply to both.

The learned judges who decided the Special Case seem to have thought that this was a *casus improvisus*, that the Legislature ought to have provided for the decision of such questions, and that the only provision they had made was by providing a method of financial adjustment between parishes. It is, of course, impossible for us to tell whether our legislators did or did not foresee that such questions would arise. But it occurs as a not impossible hypothesis, that the difficulty was fully foreseen, and that those in charge of the measure formed the opinion that the statutory provisions as to settlement could quite well be applied in working out the results of such changes of area. We have already tried to show that all questions of settlement can be simply and reasonably determined, and it does not seem presumptuous to think that Parliament may have taken the same view. The other ground of judgment is more intelligible, but equally unsatisfactory. It is said that Parliament has provided, in the Boundary Commissioners, a tribunal by which all such questions may be equitably determined. That is true, and holds good of all who take advantage of sec. 50 of the Local Government Act. But two observations occur—(1) The Commissioners in making such adjustments must themselves form an opinion upon the legal effect of their orders on questions of settlement, *i.e.* as to the effect which their orders would have if no adjustment were made. But no opinion of theirs is authoritative, and it would have been desirable to have an authoritative exposition of the law on the matter. This, however, has been refused, on the ground, apparently, that there is no law on the matter, and accordingly the Commissioners are driven back to form a legal opinion for themselves. (2) A little reflection will show that this may come up as a question of law, on which the Court will find it necessary to express an opinion. In certain cases there has been an exchange of territory between parishes, the areas exchanged being so nearly equal in respect of rental and responsibility that the parishes concerned will not think it necessary to take advantage of section 50 of the Act. Suppose that, after the powers of the Boundary Commissioners expire (which they do on 1st

August 1892), the parish of X relieves a pauper who has a settlement in parish A, acquired by residence in O—a district transferred from parish A to parish B. Suppose, further, that the parishes of A and B have not made any financial adjustment under section 50. It is quite clear that parish X is not liable, and that the liability attaches either to parish A or to parish B. Could the Court refuse to decide that question? Surely not. Yet it is the very same question as that put in the Special Case. We have tried to show that such questions may be simply solved if attention is confined to the statutes and irrelevant considerations excluded. In the meantime, apparently the question must remain unelucidated by judicial decision. We can only hope that when the Court does pronounce upon it, their views may be found to agree with those at which the Boundary Commissioners may arrive in the course of their duties, in making financial adjustments between parishes.

HAY SHENNAN.

Obituary.

THE LATE LORD JUSTICE-GENERAL.—The Right Honourable John Inglis, LL.D., D.C.L., Lord Justice-General of Scotland, and Lord President of the Court of Session, died at his country residence in Midlothian, on 20th August. The deceased judge had reached the age of eighty-one; but up to rising of the Court in July last, he was still in his chair in the First Division. Born in 1810, Mr. Inglis was the eldest son of the minister of Old Greyfriars, in Edinburgh. He was educated at the High School of Edinburgh, at Glasgow University, and at Balliol College, Oxford, at which last he graduated as B.A. and M.A. Admitted a member of the Faculty of Advocates in 1835, he rapidly came to the front as an eloquent and graceful pleader, and was soon known as a sound and skilful lawyer. In 1844 he was appointed an Advocate-Depute; in 1852 was Solicitor-General in Lord Derby's Administration; and, after the General Election of the same year, became Lord Advocate. He sat in the House

of Commons, as a Conservative, for Stamford. In 1858 Mr. Inglis was raised to the Bench as Lord Justice-Clerk, with the title of Lord Glencorse, in succession to Lord Justice-Clerk Hope. For nine years thereafter he presided in the Second Division, until he was promoted to the presidency of the Court of Session, and to the office of Lord Justice-General, vacant by the elevation of Lord Colonsay to the House of Lords. His lordship's career as a judge thus extended over the lengthened period of thirty-three years, and during that long term he was seldom absent from the President's chair for a single day. No more courteous judge ever sat on the Scottish Bench; none more patient and painstaking; none more devoted to his work; and the College of Justice has never numbered on its roll a more profound lawyer. Bringing a penetrating intellect and consummate knowledge of the law to bear on the varied business of the Court throughout a whole generation, the late Lord President has, in his time, laid down and made clear the principles applicable to every branch of our jurisprudence; and a complete compendium of Scots Law, expressed in terse and pellucid language, has been stored up for posterity in his admirable opinions.

The Lord President took a keen and practical interest in education. He was the author of the University (Scotland) Act of 1858, and was President of the Executive Commission which carried that statute into effect. In 1857 he was elected Rector of Aberdeen University, and in 1865 he received a similar honour at the hands of the students of Glasgow. The General Council of Edinburgh chose him as Chancellor in 1869, in preference to Mr. Gladstone. This office he did not regard as purely honorary, but rather as affording him the better opportunity for furthering the true interests of the University. Until advanced years at last prevented him, the Chancellor always presided personally at graduation ceremonies, discharging his exhausting duties there with unvarying dignity and grace. He received the degree of D.C.L. from Oxford University in 1859; and the Universities of Aberdeen, Glasgow, and Edinburgh each conferred on him their honorary degree of LL.D.

But it will be in the Parliament House that the venerable

Lord President will be most sorely missed. He was the official head and the unquestioned leader and guide of the judicial system which has its scene within these ancient precincts. There, for generations, no man has been listened to with the unqualified respect which every utterance of his commanded and received from all alike; for he never spoke a vain word or one not well-weighed, and which was not the outcome of a sense of the responsibility and dignity of the honourable office he held. Nor have his legal knowledge and legal wisdom been equalled in Scotland. We are not likely soon to look upon his like again.

MR. GEORGE HAMILTON, Solicitor, Kirkcudbright, died there on 17th July, at the age of sixty-five. He was Sheriff-Clerk of the Stewartry.

MR. CHARLES GRAY SPITTAL, Advocate, Sheriff-Substitute of Roxburgh, Berwick, and Selkirk, died at Selkirk, on 4th August. Mr. Spittal was admitted a member of the Faculty of Advocates in 1860, and was for some time Sheriff-Substitute of Caithness.

MR. ALEXANDER WILSON, Solicitor, Perth, died on 21st August, in his sixty-third year.

MR. GEORGE M. BROWN, Solicitor, Nairn, died at Grantown, on 24th August.

The Month.

Life of a Law Officer.—In the House of Commons the other day, the Home Secretary mentioned that from 1830 to 1886 there have been thirty-three Attorney-Generals and forty Solicitor-Generals.



Law Officers and the Bench.—It is a curious fact that, as pointed out by Mr. Matthews, only *three* of the present English judges have in their time been law officers of the Crown—viz. The Lord Chancellor, the Lord Chief-Justice,

and the Master of the Rolls. In Scotland we have only thirteen judges; but of these, six (the Presidents of the two Divisions, and Lords Young, Rutherford Clark, M'Laren, and Stormonth-Darling, have been either Lord Advocates or Solicitor-Generals.



Law Officers and Private Practice.—It was not to be expected that the House of Commons would readily adopt the suggestion that the law officers of the Crown should be required to decline private practice. The question was hardly seriously debated, whereas it in fact requires the greatest consideration. Another Parliament will not improbably be disposed to say that the position of these members of the Government should not remain as it is, but the disadvantage attending their withdrawal from the everyday life of the Bar is a matter which must always weigh heavily.—*Law Times*.



Judicial Memory.—Judges (says the *City Press*) are often expected to remember the facts in connection with cases which they have tried, particularly when the matter is raised subsequently by either of the parties. On Tuesday last, Mr. Commissioner Kerr had a case before him which he had tried a fortnight ago, and one of the learned counsel suggested that probably the Commissioner remembered what had happened on the previous occasion. "No," replied the Commissioner; "if I were to attempt to remember what took place in all the cases I tried, I should have been in a lunatic asylum a long time ago"!



A Somnolent Judge.—Rumour at the Four Courts is busy as to which of the Irish judges is the central figure of the following story. It seems, as the *Law Gazette* puts it, that a learned judge is wont to doze during the more or less uninteresting speeches of counsel, and from time to time to awaken to ejaculate an odd remark in the course of a speech. An eloquent Q.C. was lately addressing his lordship on the subject of certain Town Commissioners' right to a

particular waterway. In his address he repeated, somewhat emphatically, "But, my lord, we must have water, we must have water." The learned judge thereupon awoke, and startled the Bar with the remark, "Well, just a little drop, thank you, just a little. I like it strong."

* * *

Judge revising his own Sentence.—Referring to the trial of the Turners the other day for the murder of a girl, the *Law Times* writes:—"We would add once again, that the revision of their own sentences by the judges is calculated to bring the administration of justice into contempt. To sentence a person to penal servitude for life is a fearful thing—it cannot be done without profound consideration and the utmost deliberation. Everything must be weighed before it is arrived at. And yet, without any fresh evidence, upon mere reflection—and worse still, under pressure of a question in the House of Commons—it is absolutely reversed. What respect will the public pay to the solemn pronouncements of the judges while such possibilities exist?"

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Fortune-Telling.—The enlightened American citizen always expects something interesting or out of the way in reports of Canadian Courts or doings; that is, interesting as antiques are, out of the way like Stanley's pygmies. The judges of the Queen's Bench Division of the High Court of Justice of Ontario have recently been considering the question of fortune-telling. A woman was indicted for unlawfully undertaking to tell fortunes, to wit, the fortune of one Caroline J. Adams, against the form of the statute passed in the ninth year of the reign of His late Majesty George the Second, chapter 5, at the General Sessions of the Peace for the county of York. She was found guilty, and the case was reserved for the High Court. It appeared that the complainant was in the employ of the police, and went to discover if the accused was doing wrong. Her story was that the prisoner opened the door, took her upstairs, sat down beside her, took hold of her hand, looked at the palm, and read her fortune. He then paid the prisoner fifty cents, which she claimed

as her fee. Adams was neither duped nor victimised, but 9 George II. c. 5, stills lives and flourishes in Canada, although it is one hundred and thirty years ago since George himself met the common doom of kings. This Act repealed an Act passed in the first year of that James who is styled in the Authorised Version of the English Bible, a most high and mighty prince, intituled "An Act against Conjurat-ion, Witchcraft, and dealing with evil and wicked spirits" (except so much thereof as repealed a still more interesting Act passed in the fifth year of that bright and occidental star, Queen Elizabeth, of most happy memory, intituled an Act against Conjurations, Inchantments and Vitchcraft); George's Act also repealed the Scotch Act passed under Queen Mary, *Anentis Witchcraft*, and it enacted that thereafter no prosecution, suit, or proceeding should be commenced or carried on against any person or persons for witchcraft, sorcery, inchantment or conjuration, or for charging another with any such offence in any Court whatsoever in Great Britain. But for the more effectual preventing and punishing any pretences of such acts or powers as are before mentioned, whereby ignorant persons are frequently deluded and defrauded, be it enacted (says the statute) that if any person shall pretend to exercise or use any kind of witchcraft, sorcery, inchantment or conjuration, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found, every person so offending, being thereof lawfully convicted . . . shall for every such offence suffer imprisonment by the space of one whole year without bail or mainprize, and once in every quarter of the said year, in some market town in the proper county upon the market day, there stand openly on the pillory by the space of one hour, and also shall (if the Court by which such judgment shall be given shall think fit) be obliged to give sureties for his or her good behaviour, etc.

The decision of the Court was in this case, that this statute being in force on the 17th day of September 1792, was introduced into Ontario by the Act of Upper Canada, 40 George III. c. 1, by which all the criminal laws of England then existing were imported into the wilds and wilderness of

that province, and that by the statute under consideration the mere undertaking to tell fortunes constitutes the offence, and the conviction was confirmed. We may add that the pillory long since went out of fashion (*Regina v. Milford*, 20 Ont. 306).

In England, about four years ago, a man was convicted under 5 George IV. c. 83, sec. 4, which makes punishable as a rogue and vagabond "every person pretending or professing to tell fortunes . . . to deceive or impose upon any of His Majesty's subjects." He had published advertisements in various newspapers offering to cast nativities, give yearly advice, and answer astrological questions. A detective wrote to him, and received from him a circular setting forth his views of astrology as a science, and stating that by the position of the planets in the nativity and their aspects toward each other he was able to tell any applicant's fortune in the various events of life in return for certain remuneration. He never actually told anything to the detective, and there was no evidence to show whether or not he believed in the truth of his profession. It was held that on this evidence the astrologer was rightly convicted (*Penny v. Hanson*, 13 Q.B. Div. 473). Denman, J., in giving judgment, said: "It is absurd to suggest that this man could have believed in his ability to predict the fortunes of another by knowing the hour and place of his birth and the aspect of the stars at such a time. We do not live in times when any sane man believes in such a power." He thought that there was an intention to deceive on the part of "Neptune the astrologer," in professing his ability to tell the fortune of the detective. The *Law Quarterly Review*, vol. iii. p. 360, remarks that these words of Mr. Justice Denman "mark the fall of an old belief. It is certain that two centuries ago men of first-rate ability believed that fortunes could be foretold from the aspect of the stars. We may even doubt whether his lordship's enlightenment does not mislead him as to the average condition of modern belief. Not many years have passed since excellent persons believed in table turning. Educated men have supposed that they could learn a good deal from what a child saw, or said he saw, in a crystal ball. The belief in astrology is more venerable, and certainly not more

irrational than the belief in the miracles at Lourdes. From a theoretical point of view, Mr. Penny might have a good deal to say for himself; practically, it is no doubt desirable that Neptune the astrologer, and the like, should be treated as the rogues which they are generally found to be by their dupes."

Under the same section of the Act of George IV., in 1877, a spiritualist, who pretended to have the supernatural power of summoning spirits from the vasty deep and making them come at his call, and obtaining from invisible agents and the spirits of the dead, answers, messages, manifestations of power, noises, rappings, and the winding up of a musical box, and so attempted to deceive and impose upon certain persons who attended his seances, was convicted as a rogue and a vagabond, and punished accordingly with three months' imprisonment with hard labour (*Monck v. Hilton*, 2 Exch. Div. 2623).

The statute of Mary Stuart, above referred to, is interesting; here it is *verbatim et literatim*: "For-sa-meikle as the Queenis Majestie and the three Estaites in this present Parliament, being informed that the heavie and abhominable superstition used be diverse of the lieges of this Realme, be using of Witch-crafttes, Sorcerie and Necromancie, and credance given thereto in times bygane, against the Law of God, And for avoyding and away-putting of all sik vaine superstition in times to-cum, It is statute and ordained be the Queeneis Majestie, and the three Estaites foresaidis, that na maner of person nor persones, of quhat-sumever estaite, degree, or condition they be of, take upon hand in onie times hereafter, to use onie maner of *Witch-craftes, Sorcerie or Necromancie*, nor give themselves furth to have onie sik craft or knowlege thereof, their-throw abusand the people: Nor that na persoun seik onie helpe, response, or consultation at onie sik users or abusers foresaidis of *Witchcraftes, Sorcerie or Necromancie*, under the paine of death, alsweil to be execute against the user, abuser, as the seiker or the response or consultation. And this to be put to execution be the Justice, Schireffis, Stewards, Baillies, Lordes of Regalities and Royalties, their Deputes, and uthers ordinat Judges competent within this Realme, with all rigour, having power to execute the samin" (Ninth Parliament, IV. of June 1563). — *Albany Law Journal*,

Trespassers will be Prosecuted.—This is the time of the year when the thoughts of the busy practitioner, and his over-worked (?) articulated clerk, naturally turn from the hot and musty office to the sea or the mountains, as the case may be. And rightly so, for we say, empathically, that there is no class of men by whom a holiday is more deserved, or to whom it is more necessary than the conscientious and hardworking lawyer. We go further, and do not scruple to assert that no ordinary mortal can safely stick hard at work, enduring all those countless anxieties and responsibilities inseparably incident to the practice of a rising lawyer, unless he take a periodical rest to recuperate his exhausted brain. It is idle to say that he has not the time; he must *make* the time. It is absurd to suggest that he cannot afford it; he *must* afford it, or nature will assuredly be avenged and compel him *in invitum* to lay up under circumstances which will certainly not be jovial. Far be it from us to appear to give any countenance to the lazy and undeserving man. We are addressing only the workers, for they alone can truly enjoy the supreme delight of that short holiday which months of incessant toil unquestionably earn. Such a holiday can be deliberately enjoyed as a necessary *right*, and need not be speciously urged as a cloak for laziness. The difference between the genuine enjoyment of an undeniable right and the apologetic assumption of a superfluous luxury is so well known that we need not enlarge upon it.

It may occur to the reader that in ventilating our somewhat strong views on the holiday question, we have forgotten, if, indeed, we have not ourselves violated our title, and committed with blissful inconsistency a cool trespass on the pages of the *Law Gazette*. No, we are not an articulated clerk striving to teach our principal his duty! We apologise and "return to our muttons." Which of our readers who has spent his holiday on a walking tour has never been confronted in the course of his peregrinations with the awe-inspiring notice that "Trespassers will be prosecuted," followed sometimes by a mysterious and grandiloquent *addendum*, calculated to inspire additional terror in the heart of the quaking pedestrian, to the effect that such prosecution will be conducted "with the utmost rigour of the law"? We purpose to discuss

this terrible notice, and to see whether its bite is really as bad as its bark would seem to suggest, and when by the application of a little common sense and two or three examples we have stripped it of its prescriptive veneration and its pompous diction, we believe our readers will enjoy its ridiculous conceit and its impotent self-assertion. Its mysterious *innuendo* is well calculated to deter the ordinary tourist from bringing himself into conflict with some hidden terror, and having to justify at his own expense an act to which the most sensitive conscience can hardly ascribe any wickedness. But we are at a loss to comprehend the widespread misconception which appears to exist as to the real power of such a notice. Our position is that these notices are nothing more than an arrogant and bombastic threat, which derive their deterrent influence from obsequious custom and subservient timidity, and that they are in reality as impotent and harmless as the fabulous "ass in the lion's skin"; in other words, they are aptly described by Mr. F. W. Maitland as a wooden falsehood (*Justice and Police*, p. 13).

There is no doubt that the law has always been very jealous of the rights of the landowner, and in its zeal has at times descended to an almost ludicrous frivolity in repressing trivial acts of trespass. For instance, in *Gregory v. Piper* (9 B. & C.), Parke, B., solemnly decided that it was an actionable trespass to place a single pebble so as to lean against my neighbour's wall. But the "fetching" word in all these notices is the word "prosecuted." Every layman knows that the word "prosecuted" is applicable only to *criminal* proceedings, and invariably associated in the popular mind with police and magistrates. If the notice merely said, "Trespassers will be sued for damages," every school-boy would laugh it to scorn so far as it could reach him for merely walking across a pasture-field or a moor. What actual damage could in such a case be possibly sustained? Of course, we do not forget that trespass is an *injuria sine damno*, and that, therefore, actual pecuniary damage is not essential. As a matter of fact, a notice in the latter form is substantially the only form in which it has any truth or meaning. You cannot be *prosecuted* for a bare trespass. The landowner's only remedy is to bring an action for damages,

a somewhat ludicrous proceeding for an isolated trespass unaccompanied with insult, malicious damage, or claim of right. The writer was present in a Lancashire County Court one day last month, when a batch of poor boys were sued for damages for trespass in disobeying one of these high-handed notices. What was the result? Why the plaintiff was so sensible that the people in the body of the court were laughing at him that he withdrew the case. The Court would probably have apportioned twopence halfpenny amongst the boys as damages, and as the plaintiff himself proved the trespass he would have had no costs except the bare court fees, without a special order of the judge, which, in such circumstances, there being no accompanying aggravation, we do not believe any judge in England would have made. We will now refer to two cases which strikingly demonstrate what we wish to convey, *i.e.* that for a *naked* trespass a man cannot be *prosecuted*. Of the first case we have not been able to find any report other than a reference in *Wigram's Justices' Note Book*, 4th ed., p. 443; but it will serve for purposes of illustration. A man was charged before one of the metropolitan police magistrates under the following circumstances:—The prosecutor had gone on a holiday, leaving his town house in charge of a female servant. It subsequently came to his knowledge that his trusted domestic was having "high jinks" during his absence, entertaining quite an army of followers. Our friend accordingly essayed to learn the truth, and returned one night surreptitiously that he might see for himself how the land lay. He arrived at home late, and all was decently dark and quiet. He found nothing to confirm his suspicions until he caused the sanctum of his peccant domestic to be invaded, when she was found to all appearances enjoying dutiful and innocent slumber. But, alas, alas! for the waywardness of human nature. Underneath her bed was a man. And so it was, after all, but too true. Righteous indignation seized our friend, and he promptly hauled up the intruder before the magistrate, anticipating, no doubt, that summary justice would be meted out, and his sense of insult sharply vindicated. But he was quickly undeceived, though it was some time before he recovered from the shock entailed by realising how utterly fallacious

were his notions of the power of the criminal law in protecting the sacredness of private property. The defendant's object was perfectly plain, and it was also obvious that that object was not *per se* unlawful—for the English law has as yet formulated no final sanction for a breach of the seventh commandment. The magistrate had, therefore, no alternative but to discharge the defendant.

The other case is of considerably more importance, since it has found its way into the recognised reports, and it unequivocally exploded this huge popular fallacy. We refer to *Eley v. Lytle* (50 J. P. 368). Shortly, the facts were that some footballers were peaceably enjoying a game in a field adjoining the respondent's garden when an erratic punt landed their ball "over the garden wall." Without more ado one of the players invaded the garden to recover the ball, which was speedily done. But the irate proprietor had watched the whole proceedings, and at once laid an information, under 24 & 25 Vict. c. 97, secs. 24 and 52, for trespass and malicious injury to his garden. The hapless defendant was in mortal trepidation, and saw himself, in imagination, the inmate of a cell drinking "skilly" out of a tin basin. As his education had led him to expect he was convicted. But his friends did not forsake him: some one gave them sound advice, upon the strength of which they appealed to the Divisional Court, who unhesitatingly, and in the most emphatic manner, quashed the conviction, on the ground that there could be no conviction for trespass where only nominal damage was occasioned, and there was no malicious intent. What more positive negation of the foolish fallacy which forms the title of our article could be adduced?

Who has not seen the look of unutterable dismay which overspreads the features of the small boy, who, forgetting the narrow confines of his small cricket pitch, "opens his shoulders" to square leg only to see his solitary cricket-ball vanish over an adjoining garden wall, to be, as he fancies irretrievably, lost, unless, indeed, he can obtain that leave, which his quaking heart tells him will be indignantly refused, "to look for his ball in your garden, sir"? But this boy will soon belong to a past generation. A new generation is springing up, educated in accordance with the judgment in

Eley v. Lytle (sup.), a generation which questions the sacredness of the most heavy prescription, and whose small boy will be free from the timidity of his ancestors, and only recognise the first nine commandments.

Of course, the landowner has one other remedy besides the cumbrous one of a practically impossible action for damages, and if he can afford it, it offers perhaps the best solution of the difficulty; he can keep on his premises or garden a trusty professional "chucker-out." It is, of course, indisputable that a trespasser who refuses to leave on demand can with impunity be taken by the shoulders and forcibly ejected, provided no more force is used than is absolutely necessary.

In conclusion, it must not be supposed that our remarks are intended to encourage or countenance impudent invasion of private property; far from it. We should doubtless be the first to resent the *unauthorised* invasion of our park (if we had one!) by the ubiquitous tripper or the "B——" line tourist. We should ourselves, upon principle, never commit the most innocent trespass without first asking leave, if that were reasonably possible. But what we have endeavoured to explode, and do not hesitate to condemn, is the notoriously prevalent, and yet withal untenable, assumption that the landowner is at liberty to invoke the sanctioning of the criminal law to punish a harmless trespasser.

If his domains have been invaded by the unsuspecting and innocent tourist, the day is forever gone when he can rudely call upon him to surrender, pointing with imperious finger at a tottering notice board whereon is displayed in almost worn-out characters the egregious dogma which we are attacking. No longer can he demand your name and address, and then, remorselessly ignoring the apology which the true Englishman will always tender, hurry off to lay information before the nearest magistrate in vindication of a right which is only recognisable in a civil court, and which even *there* a nineteenth century jury will, in the absence of accompanying aggravation, view with justifiable disfavour.—*Law Gazette*.



International Association of Penal Law, held August 1890.
—It is the general belief of outsiders, that the germ of this

young association, which, during its two years' existence, has already made astounding progress, must be sought in the doctrines of Lombroso, as laid down in his *Uomo Delinquente*, and the theories of his followers, the so-called Italian school. This is an error. Anthropology in regard to the criminal had existed before Lombroso's famous book, but the great alienist, in trying to prove that the criminal is born a criminal, and that, therefore, he cannot overcome his hereditary dispositions, has aroused the interest of jurists and others for anthropological investigations. The science of criminal law began from that time to occupy itself more with criminal anthropology than it had ever done before. Inasmuch as the formation of the International Criminal Association is an outgrowth of this generally aroused interest, it may be brought in connection with the Italian school, but it is not more an adherer to the doctrines of that school than it adopts the old penal law systems of the legal theorists. Its propositions form indeed no absolute confession of faith to which adherence in every particular is required, but are rather a statement of the general tendency of the association's work. The aims and principles of this international organisation, very little known in the United States, are told in the language of the constitution, of which Roland P. Falkner, of Philadelphia, made an admirable translation in the *Annals of the American Academy of Political and Social Science*, July 1890. I reproduce here this translation:—

" I. The International Criminal Law Association holds that crime and its repression should be considered from the social as well as from the juridical standpoint. It purposes the incorporation of this principle, and the consequences which flow from it, in the science of criminal law and in penal legislation.

" II. The association adopts, as the fundamental basis of its labours, the following propositions:—

" 1. The purpose of criminal law is the struggle against crime viewed as a social phenomenon.

" 2. Penal science and penal legislation should take into consideration the results of anthropological and sociological studies.

" 3. Punishment is one of the most efficacious means at the

disposal of the State in combating crime. It is not the only means. It should not be separated from other social remedies, and especially from preventive measures.

" 4. The distinction between habitual and occasional delinquents is essential in practice as well as in theory, and should be at the base of provisions of the penal law.

" 5. As the administrations of criminal courts and of prisons pursue the same end, as the significance of the sentence depends upon the mode in which it is carried out, the distinction common in modern law between the repressive organs and the prison organs is irrational and hurtful.

" 6. Restraint of liberty occupying justly the first place in our system of punishments, the association devotes special attention to all that concerns the improvement of prisons and allied institutions.

" 7. With respect to punishments by imprisonments of short duration, the association considers that the substitution for imprisonment of measures of an equivalent efficacy is possible and desirable.

" 8. With respect to punishment by imprisonment of long duration, the association holds that the length of the imprisonment should not depend only upon the results obtained by the penitentiary system.

" 9. With respect to incorrigible, habitual delinquents, the association holds that the penal system should aim at placing such delinquents beyond the possibility of harm for as long a time as possible, and this independently of the gravity of the offence, even when there is merely a repetition of minor offences.

" III. The members of the association agree to the fundamental propositions above announced. Members of the association may propose the admission of new members to the executive committee. Such proposal must be in writing. The executive committee decides upon it by a majority vote, without stating the reasons of its decision.

" IV. As a general rule one session is held each year. The sessions may, under circumstances, take place at longer intervals. At each session the association designates the times and place of the following sessions.

" V. The executive committee determines the order of pro-

ceedings, and provides that a basis of discussion shall be prepared by reports. It presents at each session a report of the progress made since the date of the preceding reunion in the penal legislation of the different countries. It publishes this report and also an abridgment of the minutes of the meeting.

"VI. The association elects the members of the executive committee. It provides at each session for the use of such languages as will most facilitate its deliberations. The questions placed upon the order of proceedings of a session are not submitted to a vote. Nevertheless, when two-thirds of all members voting unite in the support of any proposition submitted to the meeting, it is added to the fundamental propositions enumerated in Article II.

"VII. The meeting votes by simple majority. Absent members may send in their votes by letter. For every modification of this constitution a majority of two-thirds of the members voting is necessary.

"VIII. The executive committee is composed of three members, who divide among themselves the duties of president, secretary, and treasurer. The committee chooses from its number the president of the general meeting.

"IX. The annual dues are fixed at six francs (\$1.20). Their collection is the duty of the treasurer."

The first meeting of the association was held at Brussels, 1889. It had then 250, at the second over 500 members. It issues a bulletin in French and German, which reports on the work done, and in which, also, the reports of the chief speakers as well as the debates are published. The bulletin will also be issued in the English language as soon as the increase of the number of English-speaking members makes it desirable. Application for membership may be addressed to the below-named officers, or to any member of the union. The United States are represented by the following members: Mr. F. R. Brockway, superintendent of Elmira Reformatory, New York; Roland P. Falkner, instructor at the University of Pennsylvania; Clark Bell, president of the the Med.-Leg. Society, New York; Emily Kemplin, lecturer on law at the University of the City of New York. National branches of the union have been formed in almost all countries, to facili-

tate the work of the international body by discussion of the different topics, and meetings are held previously to the annual congress. Among the members we find the names of the most eminent jurists and scientists of all countries. The business of the association is managed by its officers: Dr. Ad. Prins, Brussels; Dr. A. Van Hamel, Amsterdam; and Dr. Franz von Liszt, Halle, professors of criminal law in the universities of the respective cities. The merit of having founded the union lies principally with Professor von Liszt, who is well known in Europe by his learned treatise on criminal law and other works on penal law topics, and is also the chief editor of the standard German criminal law magazine (*Zeitschrift für die gesammte Strafrechts-wissenschaft*). The main questions that occupied the attention of the association at the second meeting, held at Berne, Switzerland, in August 1890, were the treatment of minor and habitual offenders, which had been already criticised as needing reforms at the meeting in Brussels. The association then declared the greatest defect of the present system of treating habitual offenders to be a lack of classification, the uniformity in the treatment of habitual and occasional offenders, and the abuse of short sentences, which permit habitual offenders to return to society without sufficient protection of the latter. The main topic for the second meeting was therefore: How shall the law define incorrigible and habitual offenders, and what measures shall be recommended against this class of criminals.

The very lively debate of this important subject showed the usefulness of the union. The scientists, representing France, Germany, and Russia, stood on so different grounds, that, if the association had no other aim but to give to the leading persons interested in criminal law an opportunity to exchange their ideas, its work would be of the greatest value.

The resolution finally adopted by the association was a compromise of the contradictory views of its members. It reads as follows: "There are offenders for whom, on account of their physical and moral defects, the common reaction of ordinary punishment is insufficient. To those belong the recidivists, who must be counted among the degenerated or

professional criminals. Special measures must be taken against these persons, according to the grade of their depravation and the danger they expose to society."

In regard to juvenile offenders, the association resolved, after a very interesting discussion, that no prosecuting steps shall be taken against children, but criminal prosecution shall be substituted by measures of an exclusive educational character. A child shall not even be punished if it had the capacity of distinguishing between right and wrong.

As the association holds that short imprisonment confirms too often men in criminal conduct, it discussed at its first and second meeting the various substitutes for this punishment.

As one of such means, it recommended at the session in Berne that punishment by imprisonments of short duration can be replaced by sentencing the offender to compulsory work without imprisonment.

Though the birthplace of the International Association is Brussels, the evidence of its vitality has been given at the second meeting at Berne.

The interest aroused in all parts of the civilised world for this young body was unusually great, and the increase of the number of members showed that the foundation of such an organisation was timely.

But better guarantees than all this outer success are the earnestness, the love for humanity, connected with the sense of justice, which unite its members to a strong body in the struggle against crime. Indeed, when leaving the hospitable city in which the second meeting was held, and separating from the members of the association, every one of the attendants, though coming from different parts of the globe, felt as leaving long known, dear friends.

There is also neither theoretical fanaticism nor vague idealism to be found among the leaders of the union, but that noble spirit which makes the work of the association, as the president of the Swiss Republic said in his opening address, "The dawn of a reform which will be distinguished in the history of criminal law, and therefore, also, in the history of mankind."—*Medico-Legal Journal*.

Servants setting up rival Business.—The relation of master and servant in modern times has become somewhat complicated, and it is not unusual for employers on engaging some classes of servants to bind them over not to set up a rival business when they part company. Such a restriction on natural liberty can only be enforced by means of some special agreement, and whenever the kind of business is one which a servant, having once mastered it, may easily carry on for his own profit after he leaves the service, there is much to be said in favour of a special stipulation to that effect. The servant naturally becomes acquainted with all the details of business, and with the class of people who are concerned, and thereby the connection of the employer may be secured for the patronage of any servant who looks forward to set up a business of his own on a future occasion. This kind of advantage is chiefly available to clerks and managers where special skill is required, and there are many ways of securing the stipulation required, as well as of describing the limitations under which the restriction is to take effect. The law is jealous of allowing any one to make a covenant which will shut him out altogether from employing himself as he may think fit, and will not allow him to enslave or pauperise himself unless some reasonable limit is put to the engagement. Hence there must always be metes and bounds shown as a justification for the self-denying ordinance which the servant imposes on himself. Some of the later cases on this subject are always edifying, as they closely relate to leading doctrines, and to the policy of the law, which are becoming every day more important.

Many of the cases which have arisen out of this class of difficulties between employers and their late servants have turned on the distance or area within which the stipulated restriction is to operate, or to the duration of time. And all sorts of niceties have been discussed, chiefly in courts of equity, as to the interpretation of the covenants as to time and place, and as to the reasonableness of the arrangements generally. But it is not necessary to go far back for illustrations. In the leading case of *Leather Cloth Company v. Lhorsont*, L. R. 9 Eq. 345, Vice-Chancellor James had to examine the subject closely. According to that case, although public policy

requires that every man shall be at liberty to work for himself, and shall not deprive himself of the state of his labour, skill, or talent, yet it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labour, skill, or talent; and when that advantage requires him to enter into stipulations, he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject-matter of the contract. Hence, upon the formation of a company for the purchase and working of the process of manufacture of leather cloth introduced into this country from America, the agreement for purchase contained a provision that the vendors would not carry on in any part of Europe any manufactory for the sale of productions now manufactured by the vendors, so as to interfere with the exclusive enjoyment by the purchasing company of the benefits then purchased. Much controversy arose on the wide and sweeping effect of this restriction, which is equally applicable to master and servant, and at a later stage it was contended that one of the vendors could not set up a factory in England to make leather cloth of the same kind. The defendant had once been manager of the vendors' company in America, and, when sued for breach of the covenant, contended that such a covenant was like contracting oneself into idleness for the rest of his life, and depriving oneself of the means of livelihood. But the Vice-Chancellor held that the defendant had broken his covenant, and that the covenant did not, in reality, violate any of the rules of law, and was not more than an adequate restriction for the benefit of the purchasers.

Another case, of *Rousillon v. Rousillon*, 14 Ch. D. 351, involved what seemed another sweeping restriction, which was said to be far too wide. The plaintiffs were champagne merchants at Epernay in France, having an office in London. They were not owners of any vineyard, but bought grapes from the owners of vineyards in Champagne, and manufactured them into wine. The defendant was a nephew and a clerk, and had been employed by his relatives as a traveller, and entered into an agreement with them not to represent any other champagne house for two years after having left them, and not to engage in the champagne trade for ten years after

leaving them. He started as a wine merchant in London, and began to sell wine, and to describe himself as of "Ay, Champagne," though having no establishment at that place. He was sued in this country for an injunction, and he contended that as the restriction would apply to the whole kingdom of Great Britain, it was altogether void. Fry, J., held, however, that the covenant was valid, and that as the defendant imported wine from Champagne, and put on it his own brand, this amounted to a guarantee of its excellency, and to a breach of his covenant. The covenant did not, according to the learned judge, go beyond the protection which the defendant's former employers required, and hence, though it extended over the whole kingdom, this was merely an incident of that particular trade. The judge said that the cases where an unlimited prohibition had been held void, related only to circumstances in which such a prohibition had been unreasonable. And here there was nothing unreasonable.

The next case is a more homely illustration of what takes place in smaller trades. In *Baines v. Geary*, 35 Ch. D. 154, the plaintiffs were dairymen, and engaged the defendant as milk carrier and general servant, and liable to be discharged after a fortnight's notice. The defendant, on being engaged, signed an agreement that he would not, after being discharged, "serve, or cause to be served with milk, or any other dairy produce for his own benefit, or that of any other person, or either directly or indirectly interfere with any of the customers, served or belonging at any time to the plaintiffs or their successors in business." The defendant left the service of the successors of the plaintiffs, and started in business in the same district, and served some of the old customers, whereupon he was sued for an injunction. One contention was, that the agreement was void, because it prohibited serving customers, who might at any future time belong to the plaintiffs. The judge, however, held that the agreement might be treated as severable, and to apply to their customers only, in which case the defendant had broken his agreement, and so was liable to the injunction. The Court in this way cut down what seemed to be an unlimited agreement to one which seemed reasonable, namely, that those customers were

not to be interfered with who had been customers during the service of the defendant.

The doctrine that a covenant of a general kind may be treated as severable, and held good as to a more limited period, is not of universal application, as was seen in a later case of *Baker v. Hedgecock*, 39 Ch. D. 520. The plaintiffs were tailors in Holborn, and, on engaging the defendant as foreman cutter and general superintendent at a salary of £5 per week, required him to sign an agreement "that he would not enter into the service of any other person or be interested in any business within one mile of Holborn for two years after leaving the service." The defendant quarrelled with the plaintiffs, and, on leaving, set up the business of a tailor within one hundred yards of the employers' shop. When sued for injunction, the defendant contended that the covenant was void, because it prohibited every kind of business; and the plaintiffs, on answering that objection, then asked that the injunction should only be applied to the business of a tailor. But Chitty, J., held that this severance could not be made, for that the covenant was one and indivisible, and there were no means of ascertaining how far any one part was intended to apply to one particular business more than to another.

The latest case, of *Mills v. Dunham*, 1891, 1 Ch. 576, is also one of very general application. The plaintiffs were called the Food Antiseptic Company, and were manufacturers of a food preservative called "Frigiline." They engaged the defendant as a traveller and assistant at a salary of £104 besides travelling expenses. He signed an agreement to devote all his time to the business of soliciting orders, and that "in the event of the termination of the agreement, the defendant should not, for or on account of any employer, or on his own account, at any time, either by himself or in partnership with any other person or persons, call upon, or directly or indirectly solicit orders from, or in any way deal with, any person or firm who, during the continuance of the agreement, should be customers of the plaintiffs or any future successors of the plaintiffs' company." This agreement seemed to avoid some of the errors in former cases. The defendant, after a time, received notice to leave, and he entered into the employment of the Freezeall Food Preserva-

tion Company, who carried on a similar business to that of the plaintiffs. The defendant, as the traveller of the latter company, solicited orders from some of the customers of the plaintiffs, whereupon an action for injunction was commenced. The defendant set up the defence that the covenant was too wide, and put it in the power of the plaintiffs to exclude the defendant from all business whatever with the former customers of the plaintiffs. On the other hand, the plaintiffs contended that the covenant did not go further than was necessary to give reasonable protection to the person imposing it. Hence, the question was, whether this agreement showed an unreasonable restraint of trade.

The judge (Chitty, J.) had to interpret the covenant, and he came to the conclusion that though there were very wide words, namely, "shall not in any way deal or transact business with the old customers," yet that it might be reasonably construed as applying only to business of the same or a similar kind. Another objection was, that the agreement extended during the whole life of the defendant, and the judge held that this was not a well-founded objection as to time. He therefore held the agreement to be valid and enforceable. On appeal, the Court of Appeal agreed with the judgment, and construed the general words "deal with" as amounting to nothing more than the particular kind of business in which the plaintiffs were concerned. As Lindley, L. J., observed, the principle of all the cases is, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. Hence, if the Court thought that this agreement was a reasonable protection to the plaintiffs, the same could be enforced. The Court did not unanimously arrive at this conclusion, for one of the Lords Justices had great doubts whether the agreement was not intended by the plaintiffs to prevent every kind of business; nevertheless he did not dissent from the conclusion, for the reason that the words might reasonably be confined to business of the kind hitherto carried on.

These cases show that, in disposing of this class of cases, great discretion is exercised by the Court as to what is or is

not a reasonable protection to the employer.—*Justice of the Peace.*

Reviews.

Studies in Constitutional Law. By EMILE BOUTMY. Translated by E. M. DICEY. With an Introduction by Professor A. V. DICEY. London: Macmillan & Co. 1891.

THIS little volume contains three able, instructive, and suggestive essays on the Constitutions of England, of the United States, and of France. They increase our admiration of M. Boutmy's power of understanding and appreciating widely different forms of government, which includes a breadth of view and a critical acuteness not easily combined. They confirm us in our former opinion, that he has not done himself justice in the single volume on the English Constitution, which we recently criticised. The outline so clearly sketched in the present volume should have been, and we trust will yet be, filled in in a more complete and exhaustive manner than has there been done.

We can wish a student no better introduction to the study of the Constitutions of the three countries, of which the writer here treats, than the pages before us. They are like a guide-book, which contributes to the ultimate enjoyment of the traveller by warning him against false hopes and undue expectations. They also caution him against rash analogies and too strong contrasts. The English Constitution is shown to be not so chaotic and not quite so much the result of chance as it perhaps has been represented to be, and as it at first sight appears. The Federal Constitution of the United States, it is pointed out, is democratic in a very different sense from that of France, and does not always involve the deadlock one would naturally expect after perusing the provisions of the various documents which define it. The perfection aimed at by the Constitution of France is admitted to have its drawbacks. The author finds the key to the English

Constitution in history, to the Constitution of the United States in expediency, and to that of France in logic. We have no text of our Constitution to which we can refer the student, but there are centuries of custom and tradition, of struggles and of compromises, which must all be taken into account. The Federal Constitution of the United States has a text, but it was drawn up with a view to centralisation on the one hand, and to the preservation of the rights of the different States on the other. Not the individual man nor the individual citizen, but the State, was the political unit in contemplation. M. Boutmy considers that even in the different States the much-vaunted religious liberty and the political privileges enjoyed by the individual citizens are due rather to the spirit of mercantile competition than to any advanced ideas of freedom or of rights. "The United States," he naïvely remarks, "are primarily a commercial society, and only secondarily a nation."

In France, all was different. There the legislators were imbued with high-flown philosophical conceptions of the rights of the individual man, and endeavoured to give logical effect to these rights by embodying them in what was intended to be an ideally perfect Constitution.

M. Boutmy, writing for Frenchmen, enters less into detail with regard to the Constitution of his own country than of the others. He introduces it rather for the purpose of comparison than of description. He considers it a more "artistic whole" than the two Anglo-Saxon Constitutions, and as "inspired by elevated ideas" in which they are wanting; but he concedes to them "an elasticity" and "a capacity of adaptation" which that of France does not possess. If he has published a fuller work on the French Constitution we should like to see it translated into English, and we fancy he could not entrust the work to more capable hands than those of his present translator. Professor Dicey, besides his short introduction,—in which he is careful to tell us that these essays were written before the exhaustive work by Mr. Bryce on the American Commonwealth had appeared,—has appended several useful notes of reference. Altogether, the volume will be a welcome addition to the library of every student of Constitutional Law.

English Decisions.

JUNE—JULY.

(All current English decisions likely to throw light upon any point of Scottish law or practice, are here reported.)

PATENT.—*Agreement for share in patent, whether proper to be entered on Register of Patents—Patents, etc., Act, 1883 (46 & 47 Vict. c. 57), sec. 23—Patents Rules, 1883, rr. 65, 68—Detention of letters patent by owner of one-third share.*—The patentees of an invention requested C. to assist them in developing and procuring the adoption of their patent, which he agreed to do. After some prior correspondence, they wrote him a letter, by which they agreed to give him, in consideration of his “services as practical manager in working” their patent, “one-third share of” such patent from the date of such letter. C. in fact gave his services as agreed. The said letter was at his instance entered on the Register of Patents as a document conferring an interest in the patent. Subsequently the patentees handed him their letters patent to assist him in negotiating a sale of the patent, but, as he failed to do so within the stipulated period, they desired him to return them the letters patent, which, however, he declined to do. The hearing of an action of detinue by the patentees to recover their letters patent, and of a motion by them to expunge from the register the entry made as aforesaid at C.’s instance, came on together. *Held* (by Mr. Justice Romer), that, having regard to the circumstances and the prior correspondence, the agreement contained in the letter aforesaid was intended to confer, and did confer, on the defendant unconditionally, a one-third share of the patent from the date of the letters, and that even if such agreement did not amount to an assignment (properly so called) of an interest in a patent, it was, within the meaning of rule 68 of the Patents Rules, 1883, a “document affecting the proprietorship” of the patent, and therefore properly entered on the Register of Patents, under sec. 23 of the Patents, etc., Act, 1883, and rr. 65, 68; and that the motion must accordingly be refused. But, *semble*, that the said agreement did amount to an assignment (in the broad sense of the term) of an interest in the patent. *Held* also, that after the projected sale of the patent had failed, the defendant, being owner of only one-third share in it, had no right to retain possession of the letters patent against the plaintiffs, who were owners of the other two-third shares.—*Re Casey; Stewart v. Casey*, High Ct., Ch. Div., 8 June.

WILL IN SCOTTISH FORM OF DOMICILED SCOTSMAN.—*Real estate in England and Scotland—Charitable legacies—Mortmain—Administration—Incidence of debts, legacies, and annuities under English and Scottish Law respectively.*—A Scotsman, by his “trust disposition and settlement,” appointed the plaintiff and the defendants trustees and executors thereof, and devised and bequeathed to them all his

property, heritable and moveable, real and personal, wheresoever situated, upon trusts which included directions for the payment of his debts, funeral and testamentary expenses, and divers annuities and legacies, and for the distribution of his residuary estate among his children; and in the event (which happened) of failure of his children and their issue before the period of vesting, the testator directed his trustees to divide and apportion his residue (after payment of certain further legacies) amongst certain specified charitable institutions; and to enable them to carry out the purposes of the said settlement he thereby empowered his trustees, whenever they thought it fit, to sell and convert into money the whole estate or any part thereof, and he declared that he desired his affairs to be administered and wound up as far as practicable in accordance with the law and practice of Scotland. He died possessed of real estate in England of considerable value, besides real estate in Scotland, and personal estate in the United Kingdom which alone was more than sufficient to provide for all his debts, funeral and testamentary expenses, annuities and legacies. Certain questions have been raised upon this trust disposition, as to whether the gift of residue to the charitable institutions was not void by English law, so far as payable out of the English realty, and whether such realty was not therefore undisposed of, a case was remitted from the Scottish Court to the English High Court of Justice for its opinion on these questions, and Mr. Justice Kay held, upon that case, that such gift was void under the Statutes of Mortmain, so far as payable out of English real estate, and that the plaintiff was entitled as heir-at-law to the testator's English real estate or the proceeds of sale thereof. The plaintiff thereupon brought this action in the English High Court, claiming—(1) A declaration that the charitable gifts, as far as payable out of English real estate, were null and void; (2) a declaration that the personal estate was the primary fund for payment of the funeral and testamentary expenses, debts, and legacies, and that, having regard to the amount of such personal estate, nearly £100,000, the plaintiff, as the testator's heir-at-law, was absolutely entitled to the English real estate discharged from any liability to contribute to such expenses, debts, or legacies. It appeared from expert evidence, that by the Scottish law, though debts and legacies would be payable primarily out of personalty, secured annuities such as those payable under this trust disposition would be payable primarily out of realty, and that the Scottish Courts, in administering the estate of a Scottish testator, would be guided by Scottish law in dealing with such a testator's real estate, whether situated in England, Scotland, or elsewhere, except so far as it was proved to their satisfaction that such dealing was contrary to the English or other *lex loci*. Held (by Mr. Justice Romer), that though the charitable gifts, so far as payable out of English realty, were void, and the plaintiff was therefore entitled to the declaration on that point claimed by him, yet that as regarded the annuities, though by the

English law they were primarily payable out of personalty, as that law did not prevent their being charged on real estate, and the testator having clearly intimated his intention that his estate should be wound-up in accordance with Scottish law, the English real estate was liable, rateably with that in Scotland, to provide for the annuities, and the plaintiff therefore was not entitled to the second declaration claimed by him; and that the costs of the action must come out of the English realty.—*Re Hewit; Lawson v. Duncan*, High Ct., Ch. Div., 7 July.

COMPANY.—Promoter—Agreement to buy back qualification shares of director at par—Misfeasance—Companies Act, 1862 (25 & 26 Vict. c. 89), sec. 165—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), sec. 10.—This was a summons taken out by liquidators of a company, asking that it might be declared that T. A., a director of the company, was guilty of a misfeasance or breach of trust in relation to the company, in entering into an agreement with a promoter for the purchase at par by the promoter from T. A., and at his request, of the fifty preference £10 shares taken by T. A. for his qualification as such director, and for an order for repayment by T. A. of £500 and interest at 4 per cent. On the 3rd May, R. M. S. wrote to T. A. asking him to join the board of directors of the N. A. T. Company, which was then in course of formation, but T. A. was unwilling, partly on the ground that he might be called upon to go back to Queensland where he owned property. On the 13th May 1887, R. M. S. wrote to T. A. as follows: "Should you desire at any time to part with the fifty shares in the N. A. T. Company, which you are about to take up, I undertake to purchase them from you at the same price which you pay for them." On the 18th May 1887 the company was incorporated, and T. A. was nominated as a director. On the 31st May fifty £10 preference shares were allotted to T. A. for his qualification as director. T. A. paid £500 for the shares. He acted as director till the 25th June 1888, when he resigned his seat on the board in consequence of his being appointed Agent-General for Queensland. On the 3rd July 1888 his resignation was accepted. On the 22nd November 1888, R. M. S. purchased the fifty shares from T. A. and paid him £500. The transfer of the shares was executed but not registered. On the 9th August 1889 it was resolved to wind-up the company voluntarily. On the 22nd February 1890 an order was made to continue the voluntary liquidation under the supervision of the Court. *Held* (by Mr. Justice Kekewich), that the case did not fall within the sections of the Companies Acts, 1862-1890, as no loss had been occasioned to the company; and the company not having proved any loss, the summons must be dismissed with costs.—*Re North Australian Territory Company Limited*, High Ct., Ch. Div., 8 July.

COMPANY.—Borrowing powers—Trading company.—A company was incorporated in 1864 under the Companies Act, 1862. Among its objects, as defined by the Memorandum of Association, were the

granting of advances on property intended for sale, and loans on the deposit of securities, the discounting of approved commercial bills, and the purchase of houses and lands. No borrowing powers were conferred on the directors in express terms, either by the Memorandum or Articles of Association. In 1887 the company, being in need of money to pay off certain depositors, borrowed a sum of £722 from the defendant, who was one of the directors, and gave him as security an equitable mortgage on certain real estate belonging to the company. The company had since been ordered to be wound-up, and the depositors to whom sums of money were owing at the commencement of the winding-up had all been admitted as creditors of the company. In an action brought by the liquidator in the name of the company against the defendant to set aside his security: *Held* (by Mr. Justice Stirling), that the company was a trading company, and that, as the existing authorities showed, the directors had an implied power to borrow money for the purposes of the company.—*Re General Auction, Estate, and Monetary Company Limited v. Smith*, High Ct., Ch. Div., 9 July.

WILL.—*Construction—Debenture stock.*—Testator bequeathed specifically "all my shares" in a gas company. He was possessed at his death and also at the date of his will of ten £10 ordinary shares, and £200 debenture stock in the company. The specific legatee claimed the debentures as well as the shares. *Held* (by Mr. Justice Chitty), that the will did not pass the debenture stock, which was only capitalised money.—*Re Bodman; Bodman v. Bodman*, High Ct., Ch. Div., 9 July.

COPYRIGHT.—*Infringement—Injunction—Future numbers—Copyright Act, 1842 (5 & 6 Vict. c. 45), sec. 19.*—This was a motion on behalf of the proprietors and publishers of *Punch* for an interim injunction to restrain the registered proprietors of the *Ludgate Monthly* from publishing as part of the contents thereof, and whether under the heading "Advertisements" or otherwise, an illustration taken from *Punch*, of a little boy with a dog, entitled "Easy for the Judges," or any other illustration, with or without letterpress, colourably taken from *Punch*. The defendants consented to have this motion treated as the trial of the action, and the only question was whether a judgment could be taken by consent in a form protecting the future contents of *Punch* not yet published. By sec. 19 of the Copyright Act, 1842, proprietors of encyclopedias, periodicals, etc., may enter at once at Stationers' Hall and have the benefit of registration of the whole. *Held* (by Mr. Justice Kekewich), that the injunction could be extended to the protection of future numbers of *Punch*. Perpetual injunction granted in terms of the notice of motion with costs of the action.—*Bradbury, Agnew, & Company Limited v. Sharp and Others*, High Ct., Ch. Div., 10 July.

RAILWAY COMPANY.—*Statutory powers—Limits of deviation—Description of lands.*—By sec. 5 of the Tottenham and Forest Gate Railway Act, 1870, the defendant company were empowered to

make and maintain their railways and works in the lines or situation and according to the levels shown on the deposited plans and sections, and to enter upon, take, and use such of the lands delineated in the said plans and described in the deposited book of reference as might be required for the purpose of their undertaking. Included within the limits of deviation on the deposited plans was part of certain lands belonging to the plaintiffs, described in the book of reference as "nursery garden," and numbered 235. The plan showed the garden to be intersected by footpaths, some of which were projected northwards beyond the northern limit of deviation, but left unfinished, so that there was no indication on the plan as to the extent or boundaries of the area of the "nursery garden"; but part of the eastern boundary line of the garden was indicated in the space within the limits of deviation and projected northward beyond the northern limit of deviation, though it was left unfinished like the footpaths. On the west side there was no boundary shown beyond the northern limit of deviation. The whole of No. 235 was included in the book of reference. The company subsequently served the plaintiffs with notice to treat in respect of a strip of the garden lying along the northern limit of deviation, and proposed to take it under their compulsory powers. The plaintiffs now moved to restrain the company from proceeding on their notice to treat, on the ground that this strip was not "delineated and described" in the deposited plans and book of reference. *Held* (by Mr. Justice Kekewich), that the whole of the nursery garden was included in the book of reference, and sufficiently delineated, that is sketched or represented, or so shown upon the plans that landowners would have notice that the land might be taken: therefore, that the company were entitled to take the land. Motion refused.—*Protheroe v. Tottenham and Forest Gate Railway Company*, High Ct., Ch. Div., 10 July.

TRADE NAME.—*Name of company—Use of proper name of company, together with a name calculated to deceive.*—A motion was made by the Army and Navy Co-operative Society Limited, generally known as the "Army and Navy Stores," and having its principal place of business in London, and a branch establishment at Bombay, for an interim injunction to restrain the Army, Navy, and Civil Service Co-operative Society of India Limited, which carried on business in India, from carrying on its business so as to mislead the public into the belief that they were dealing with the plaintive company. The defendant company sold "Army and Navy" claret in bottles, of which the labels and capsules showed the full title of the defendant company, but the corks were stamped with that title, omitting the words "and Civil Service." It was decided by Mr. Justice Kekewich, that the defendant company was not entitled, by placing its own proper name upon its goods so that it might be seen by those who used them, to use a name which used elsewhere would be calculated to deceive; and that the words "Army and Navy" being the distinctive words of the plaintiff company's name, there

was reasonable ground for anticipating confusion of the defendant company with the plaintiff company. His lordship accordingly granted an injunction restraining the defendants until judgment in the action, or until further order, from using on or in connection with any goods sold, exported, or supplied by them the stamps or name of "Army and Navy Co-operative Society Limited" either with or without the words "of India," or any other stamp or name so closely resembling the name of the plaintiffs as would be calculated to lead the public in India and elsewhere to suppose that the goods sold, exported, or supplied by the defendants were goods sold, exported, or supplied by the plaintiffs. The defendants appealed from that order in part, asking by their notice of appeal that the injunction might be so limited as not to prevent the defendants from retaining, selling, or disposing of wines which were bottled with corks branded with the name of "Army and Navy Co-operative Society Limited of India" previously to or on the 18th April 1891 (the day of the service of the writ in the action) with the corks in the bottles containing the same. The process of removing the corks from bottles in India and substituting others would, it was said, almost certainly result in serious damage to the wine. The plaintiffs were willing to give an undertaking not to enforce the injunction as regarded a small quantity of claret which the defendants had in India. *Held* (by Lords Justices Lindley, Fry, and Lopes), that the defendants were not entitled to more than this undertaking, and that they must pay the costs of the appeal.—*The Army and Navy Co-operative Society Limited v. The Army, Navy, and Civil Service Co-operative Society of India Limited*, Ct. of App., 15 July.

WILL.—*Charitable bequest—Condition annexed to keep tomb in repair—Gift over to another charity on failure to comply with condition—Perpetuity.*—In case of a bequest of a sum of money to a charitable society on condition of the society keeping the testator's family vault in a cemetery in good repair, with a gift over to another charitable institution on failure of the former to comply with the condition: *Held* (by Lords Justices Lindley, Fry, and Lopes), that the rule against perpetuities had no application to a gift over from one charity to another charity, on the happening of a specified event, and that the condition annexed to the bequest was a valid condition, notwithstanding the fact that it created an inducement in the first charitable legatee to keep the testator's vault in repair in perpetuity.—*Re Tyler; Tyler v. Tyler*, Ct. of App., 18 July.

COMPANY.—*Winding-up—Execution creditor—Debenture-holders—Sheriff in possession before winding-up—Mistake in law—Liquidator—Priority of debenture-holders.*—A sheriff, under a *fi. fa.* issued by a judgment creditor, entered into possession of the premises of a theatrical company, and seized certain goods consisting of the theatrical properties. A petition to wind-up the company was subsequently presented. After the presentation of the petition, but before the winding-up order had been made, the sheriff received

certain moneys of the company, which were paid by the public for entrance to the theatre, and out of them paid the execution creditor. An order for winding-up compulsorily was subsequently made, and a liquidator appointed, and by an order of the Court, made on the statement by counsel on behalf of the liquidator that the execution creditor had been paid, the sheriff withdrew from possession without having sold any of the goods seized. The sheriff was then, on summons taken out by the liquidator, ordered to pay to the liquidator the moneys received by him after the presentation of the petition, but the order was without prejudice to the rights of the sheriff against the goods which he seized before the commencement of the winding-up, and which he gave to the liquidator. The sheriff paid the moneys to the liquidator, and the liquidator sold the goods. A summons was then taken out by the sheriff, asking that the liquidator might be ordered to pay out of the proceeds of the goods sold the sum paid by the sheriff to the execution creditor, and the Sheriff's charges and costs. The holders of certain debentures which constituted a floating charge upon the undertaking and all the property present and future of the company appeared upon the hearing of the summons, and claimed priority over the execution creditor. Kekewich, J., held that the debenture-holders, not having had a receiver appointed, were in no better position than an ordinary creditor who would be represented by the liquidator; that the sum in the hands of the liquidator had been increased by a transaction occasioned by a mistake of the law; that the Court would compel its officer to recognise the rules of honesty as between man and man, and accordingly that the liquidator must pay to the sheriff the amount claimed. *Held* (by Lords Justices Lindley, Fry, and Lopes), that the debenture-holders were entitled to priority over the execution creditor in respect of the proceeds of the goods which had been sold by the liquidator, and which were covered by their security, and accordingly that the summons of the sheriff should be dismissed, but without prejudice to any further application by the sheriff for repayment out of moneys in the hands of the liquidator, not covered by the debentures.—*Re Opera Limited*, Ct. of App., 18 July.

BILLS OF EXCHANGE.—*Cheque—Cheque not indorsed*—"Fictitious" person—*Cheque transferred for value—Bills of Exchange Act, 1882, sec. 7, sub-sec. 3; sec. 31, sub-sec. 4.*—The action was brought by the plaintiffs as holders in due course of a cheque for £1000 drawn by the defendant, a solicitor, in favour of one C., who had never indorsed the cheque. The plaintiffs in their claim claimed that the cheque was made payable to C., who was a fictitious person, and that therefore the cheque was payable to bearer according to sub-sec. 3 of sec. 7 of the Bills of Exchange Act, 1882, which enacts that "where the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer;" and in the alternative, that if C. were a real person, then, as he had transferred the cheque to them for value without indorsement, they were entitled to his rights by

virtue of sub-sec. 4 of sec. 31 of the Bills of Exchange Act, which enacts that "where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill." The facts were these: There had been an agreement amongst the directors of the plaintiff company that they would not let the company go to allotment unless a minimum of £15,000 capital was raised. The principal promoter, Richardson, agreed to get this amount raised, and at a meeting of the directors he produced cheques to the required amount, amongst which cheques was the cheque now sued upon. After some days it was discovered that this cheque had not been indorsed, and the directors knew nothing of the defendant. The defendant said that Richardson came to him and asked him for the cheque drawn to C.'s order, to enable C. to take up some shares which he had underwritten. Richardson undertook to be responsible for the amount, and the defendant gave the cheque. He also said that a few minutes afterwards one S., who traded as S. & C., and who was believed to be C., came in a few minutes after Richardson had gone, and he (the defendant) told him not to indorse the cheque. The learned judge found, as a fact, that the promoters, being desirous of going to allotment, devised a trick to induce the p'laintiffs to allot by presenting contracts and cheques for £15,000, and that the defendant lent the cheque to Richardson for the purpose of being laid before the directors, without intending that C. should receive the proceeds at any time. *Held* (by Mr. Justice Charles), that C. was a fictitious person *quoad* this transaction, and that the plaintiffs had a right to recover on that ground; also, that if C. were not a fictitious person, the plaintiffs were entitled to stand in C.'s place, and recover under sub-sec. 4, sec. 31 of the Act. Judgment for plaintiffs. — *Edinburgh Ballarat Gold Quartz Mine Limited v. Sydney*, High Ct., Q. B. Div., 18 July.

LIFE ASSURANCE.—*Policy in favour of wife—Death of assured—Felonious act of wife—Assurance void—Against public policy.*—In October 1888, James Maybrick insured his life with the defendants for £2000 in favour of his wife. He died in May 1889, and his wife was subsequently tried and convicted upon an indictment charging her with having murdered her husband by administering poison to him. The sentence passed upon her was commuted, on the ground that the evidence at the trial did not conclusively prove that the deceased died from the administration of poison administered to him by her. Previous to her trial the wife assigned the policy and all her interest thereunder to the plaintiff Cleaver, who, after her conviction, was appointed administrator of her property under the provisions of 33 & 34 Vict. c. 23, sec. 9. The other plaintiffs were the executors of the will of James Maybrick, in which he stated that his wife would receive the benefit of the policy in question. Upon the plaintiffs claiming the amount due upon the policy, the defendants declined to pay the same, upon the ground that the plaintiffs merely represented the wife of the

assured, and that she could not recover the amount, as the death of the assured was caused by her felonious act.' *Held* (by Mr. Justice Denman and Mr. Justice Wills), assuming that his wife did murder the deceased, that the plaintiffs were not entitled to recover the amount, as it would be contrary to public policy that a person should be able to benefit by her own felonious act.—*Cleaver and Others v. Mutual Reserve Fund Life Association*, High Ct., Q. B. Div., 20 July.

NULLITY SUIT HEARD IN CAMERA.—*Newspaper publication of result, with amplifications—Motion for attachment.*—These were two applications by the respondent in a nullity suit, respectively against the proprietors of two newspapers, in which an amplification of the result of the suit had been printed. The case was tried before the President (Sir Chas. P. Butt) on the 18th June 1891, and a decree *nisi* was pronounced upon the husband's petition on the ground of impotence. Subsequently a paragraph appeared, headed "Local Divorce Suit," and went on to describe the object of the suit, with full Christian names and addresses, and the name of the respondent's father, and place of residence of the respondent at the time of the marriage, eight years before. The one paragraph concluded thus: "The Court, being satisfied with the petitioner's case, pronounced in favour of the petitioner, Justice Butt declaring the marriage annulled." The other paragraph contained somewhat less particulars, but had a heading in larger type. The Court said that, while it was perhaps desirable that the result of such cases should be announced in the public prints, yet that should be done in the barest possible way. What had been done in the two cases before him was to give the result of the suit, amplified by full names, residences, etc. That might be a matter of good or bad taste on the part of the writers and publishers of such paragraphs; but motions of this kind were not to be dealt with upon points of good or bad taste, but upon the law applicable to such cases. After the decree was made, it was public property, and nobody could be blamed for publishing a mere announcement of a decree of this Court. It could not be said that what had been published in the present instance was any part of what transpired while the Court was sitting *in camera*. The motion for attachment in each of these cases must therefore be dismissed; but, seeing that it could not be said that the matter had been improperly brought to the notice of the Court, there would be no order as to costs in either motion.—*Lawrence v. Ambery* (falsely called Lawrence), P. & D. Div., 21 July.

EMPLOYER AND WORKMAN.—*Negligence—Volenti non fit injuria.*—The appellant, a workman in the employment of the respondents, was engaged in drilling a hole in a cutting, and while so employed stones were being lifted out of the cutting by a crane, and swung over his head. No warning was given when stones were so swung, and the nature of his work at the time prevented him from seeing them himself. He had been engaged in the work for some time, and

knew that it was dangerous, and stated that whenever he saw the stones he got out of the way. A stone fell from the crane and injured him, but there was no evidence of the cause of its falling. In answer to a question, the jury found that the appellant did not voluntarily undertake a risky employment with knowledge of its risks. *Held*, that the facts did not warrant the application of the maxim *Volenti non fit injuria*. Judgment of the Court of Appeal reversed, Lord Bramwell dissenting.—*Smith v. Baker*. H. of L., 21 July.

COMPANIES.—*Rectification of register—Compulsory winding-up—Purchase of shares after winding-up order made—Right of purchaser to be put on register as a member—Companies Act, 1862 (25 & 26 Vict. c. 89), secs. 35, 87, 98, 153.*—Appellant had purchased some shares in the Onward Building Society after an order had been made by the Darlington County Court for the compulsory winding-up of the society. The shares having been transferred to him, he made an application to the County Court judge, asking that the liquidator of the society might be ordered to place his name in the list of the members of the society. The County Court judge refused the application, holding that he had no jurisdiction to make such an order in respect of shares purchased after an order had been made for the compulsory winding-up of the society. The Queen's Bench Division affirmed this decision. *Held* (by the Master of the Rolls, and Lords Justices Bowen and Kay), that the Court has jurisdiction to make such an order as was asked for, but that the granting of such an order is a matter for the discretion of the Court, and that under the circumstances of the present case the application must be refused.—*Re The Onward Building Society*, Ct. of App., 21 July.

SHIP.—*Marine insurance—Collision clause—Ship in tow of tug—Collision with tug.*—A policy of insurance provided, "If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence become liable to pay," etc., the insured should be repaid by the underwriters. Through the fault of the ship and her tug, the tug, while towing the ship, came into collision with and damaged another vessel, whose owners recovered damages from the owners both of the ship and the tug. *Held*, that the damage was covered by the collision clause in the policy, and that the underwriters were liable. Judgment of the Court of Session in Scotland (17 R. 1016) affirmed, Lord Bramwell dissenting.—*M'Cowan v. Baine, The Niobe*, H. of L., 27 July.

NEGLIGENCE.—*Master and servant—Common employment—Contractor and sub-contractor.*—Builders contracted to build certain houses, the contractor providing that the respondents, a firm of ironfounders selected by the architect, should do a certain specified part of the work at a fixed price, which the builders were to pay out of the contract price. The builders were also to provide scaffolding and other assistance. In the course of the work the appellant, one of the builders' workmen, was injured by the negligence of one of the respondents' workmen. *Held*, that the

appellant and the man who caused the injury were not engaged in a common employment under a common master, and that the action could be maintained. Judgment of the Court of Appeal (23 Q. B. Div. 508) reversed.—*Johnson v. Lindsay*, H. of L., 28 July.

COMPANY.—*Registration—Partnership of seven persons—Partnership formed for winding-up old partnership—Right to register—Companies Act, 1862 (25 & 26 Vict. c. 89), secs. 6, 180.*—A rule for a *mandamus* to the Registrar of Joint-Stock Companies to compel him to register a certain company which he had refused to register as not being a joint-stock company within the meaning of the Companies Act, 1862, was obtained under the following circumstances:—The surviving partner in the old-established firm of W. H. A. & Co. desired to convert that firm into a limited company. Accordingly he and six others executed a deed for that purpose, and became, in fact, a partnership, consisting of seven members, the object of this partnership being to wind up the affairs of the firm of W. H. A. & Co. This partnership then applied to the Registrar of Joint-Stock Companies to register them, but the registrar refused to register the partnership on the ground that it was not a company within the meaning of the Companies Act, 1862, not having a capital divided into shares. This decision of the registrar was taken at the instance of the Board of Trade, who had given instructions that these partnerships ought not to be registered, as not coming within the scope of the Companies Acts. The rule for a *mandamus* was then obtained to compel the registration of the partnership as a company. Sec. 6 of the Companies Act, 1862, provides that “. . . Any seven or more persons associated for any lawful purpose may, by subscribing their names to a Memorandum of Association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability.” Sec. 18 provides that “. . . Any company hereafter formed in pursuance of any Act of Parliament other than this Act or of letters patent . . . or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up.” It was contended against the rule, that such a partnership was not a company; that it was not a company “duly constituted by law,” within the meaning of sec. 180, and that this partnership was not a *bona fide* partnership, but that its object was merely the winding-up of the firm of W. H. A. & Co. It was decided that all the objections urged against the registration of this partnership failed, and that the partnership was entitled to be registered as a company under the Act. The rule was therefore made absolute. On appeal: *Held* (by Lords Justices Lindley, Fry, and Lopes, reversing Mr. Justice Cave and Mr. Justice Charles), that,

assuming that such a partnership was a "company," yet when a company was constituted merely for the purpose of obtaining incorporation under the Companies Act, 1862, it was not a company "duly constituted by law" within the meaning of sec. 180; that there was nothing in Part VII. of the Companies Act, 1862, to warrant the view that a company formed for no other purpose than that of registration under Part VII., and thus evading the whole of the provisions of Part I., could be registered; that sec. 180 pointed to a company formed for the purpose of carrying on business; and that it would be an entire misconstruction of the Act to suppose that a company, formed solely for the purpose of registration, could be registered under Part VII.—*Reg. on the prosecution of Johnston v. The Registrar of Joint-Stock Companies*, Ct. of App. 28 July.

Sheriff Court Reports.

SHERIFF COURT OF ARGYLLSHIRE.

ALEXANDER COLVILLE v. DAVID COLVILLE.

Jurisdiction—Reconvention—Lodging claim in a Multiplepounding.—Held, that a foreigner who lodges a claim in a multiplepounding in the Sheriff Court in Scotland thereby becomes subject to the jurisdiction of that Court *ex jure reconventionis* in an action against him at the instance of another claimant domiciled in Scotland.

Multiplepounding—Pending action—Reconvention.—Held, that a multiplepounding which has been finally disposed of with the exception of the question of expenses in a riding claim is still a pending action to the effect of founding jurisdiction *ex jure reconventionis* against a foreigner who is a claimant therein.

In a multiplepounding raised by certain testamentary trustees in the Sheriff Court of Argyllshire at Campbeltown, claims were lodged respectively by David Colville, domiciled in London, and Alexander Colville, domiciled in Campbeltown. In the course of proceedings, two riding claims were lodged on the claim of David Colville. The two claimants were respectively ranked and preferred along with certain other claimants to certain shares of the fund *in medio*, and the share of Alexander Colville, along with that of the other claimants, except David Colville, was paid to him by the clerk of Court before the present action was raised. When the present action was raised, both of the two riding claimants had been preferred on David Colville's claim, but no finding for expenses had yet been made in respect of these riding claims. The present action was for payment of £109, of which £100 was contained in a bill drawn by the pursuer and accepted by the defender. The defender pleaded no jurisdiction in respect of his English domicile. The Sheriff-Substitute repelled the plea, and found that he was subject to the jurisdiction of the Court *ex jure reconventionis*.

The following note was added to his lordship's interlocutor :—

Note.—The defender in this case does not raise the question whether reconvention operates in the inferior Courts. That has never been a subject of direct decision in the Supreme Court ; but Lord Deas, in *Thompson v. Whitehead* (*infra cit.*), observes, *obiter*, that it is competent, and this view is implicitly involved in two cases *Barr v. Smith* (*infra cit.*) and *Goodwin v. Purfield* (Dec. 8, 1871, 10 M. 214), where the alleged reconvention was in the Sheriff Court.

In *Thompson v. Whitehead* (Jan. 25, 1862, 24 D. 331), Lord Curriehill says :—"Suppose a foreigner lodges a claim in a process of multiplepoining in a Scottish Court, he is liable to be sued in this Court by every creditor he has. That was decided in the case of *Mansfield, Ramsay, & Co.* (June 17, 1795, M. 4839 and 2594)." That his lordship was one of a minority of two in the case he was then advising (which had nothing to do with multiplepoining) does not *per se* invalidate his interpretation of that particular decision, which, if it were correct, would be more than decisive of the present case. I cannot, however, put such a wide construction on the case of *Mansfield*. It was, I think, not properly a case of reconvention at all ; and Lord Curriehill's view of it was expressly discarded in the subsequent case of *Bell v. Stewart* (June 4, 1852, 14 D. 837). In that case it was held that the mere fact of a foreigner being a claimant in a multiplepoining in Scotland did not create jurisdiction against him at the instance of a creditor who had no connection with the multiplepoining. In *Ord v. Barton* (Jan. 22, 1847, 9 D. 541), a claim by a foreigner in a Scottish sequestration was held sufficient to found jurisdiction, *reconventionis*, against him in an action by the trustee to cut down an illegal preference. This decision was followed in similar circumstances by those in *Barr v. Smith* (Nov. 18, 1879, 7 R. 247), and *California Redwood Co. v. Merchant Banking Co. of London* (July 20, 1886, 13 R. 1202). These cases form a series where reconvention has been found to operate in bankruptcy and liquidation proceedings, but the counter actions in each of them, where reconvention was founded on, were at the instance of the trustee or liquidator, not at that of an individual creditor, against the foreign creditor, which would have brought them much nearer to the present case.

The opinions of the majority of the judges in *Thompson v. Whitehead* proceed, it appears to me, on the leading ideas that reconvention is not "a source or foundation of jurisdiction," or a "rule or principle of international law," but merely "an equitable rule of compensatory pleading" where a native is sued by a foreigner in his own Courts—*nam ratio reconventionis est favor rei ne prius condemnnetur actori, quam actor sibi*, and that due limits required to be set to its application ; and the conclusion reached was that the fact of the foreigner convening the Scotsman in Scotland should not have the effect of throwing open the Courts of the defender's country to claims of any and every kind the latter might have against the former, and that the law of Scotland, "like the law of Rome,

restricts the defender's privilege to those cases when the subject matter of the two claims is of the same nature, where they can conveniently be tried at the same time and in the same Court, and can be brought to a conclusion by one judgment (as in conjoined actions), or by two separate but contemporaneous or nearly contemporaneous judgments" (*Per* Ld. Justice-Clerk in *Thompson v. Whitehead*).

The defender here argues that there has been no convention by him of the pursuer. He has not called the pursuer into Court, and is not asking him to pay him anything. He was—and the pursuer along with him—called as defender by a third party. This argument appears to me more plausible than real, and to be founded merely on the peculiar form of an action of multiplepounding. The real raisers do not conclude for anything in their own favour (except payment of their expenses out of the fund *in medio*); they conclude that decree shall issue in favour of the claimant or claimants who shall be found to have the best right to the fund, and then drop out of the case, leaving the claimants, as the real *litis-contestants* to dispute their claims with each other, each being in the position of pursuer or defender towards every other. The defender in this case, says the pursuer, by claiming on the fund *in medio*, by so much as he claims, diminishes proportionately the amount which may come to the pursuer, and thus claims something from him. In *Bell v. Stewart* there are, I think, clear indications in the opinions of the judges, that had the pursuer in that case been a co-claimant with the foreigner in the multiplepounding, reconvention would have operated. "The foreign party," says the Lord Ordinary (Rutherford speaking of the case of *Mansfield, Ramsay, & Co.*), "could not himself have claimed in the multiplepounding without opening directly to all the other claimants the plea of reconvention." . . . Lord Medwyn says, "Now I am satisfied that it would be an extension of the rule (that of *Mansfield, etc.*), fixed as to direct and immediate claimants in a multiplepounding, to allow this party, for he is not a compeerer in the multiplepounding, to have the benefit of this rule. . . . The creditor has no connection with the multiplepounding, or title to found on its effect with other claimants. . . . For when a foreigner merely appears as a claimant in a multiplepounding or pursuer in an action in our Courts, this does not give every inhabitant of this country a right to convene him for any claim whatsoever, nor give our Courts a general jurisdiction over him as if he were no longer a foreigner." I take this to mean that had the Scotsman been a compeerer in the multiplepounding, he would then have had a right to reconvene him in his own Courts.

Other cases might be cited, but I think these are all that really bear on the present question. I have therefore come to the conclusion, though not without a good deal of hesitation, that it is consistent with these cases to admit reconvention here; and in particular, that the defining and circumscribing effect of the decision

in *Thompson v. Whitehead*—that the *favor rei*, which is the basis of the principle, be not pressed into *incommodum actoris*—does not preclude its admission.

The remaining objections of the defender are that there is no contingency or connection between the claims, and that the process of multiplepinding was not pending when the present action was raised. It is sufficient that the claims be *ejusdem generis*, though they arise, not *ex eodem negotio*, but *ex diversis causis*, “provided they do not violate some other rule of pleading or principle of equity” (*Per* Lord Justice-Clerk in *Thompson v. Whitehead*). The claims here, the defender’s, at least so far (and that is about the whole of it) as contained in the bill produced, are both liquid, and may be set one against the other.

The defender’s final objection, that the present action was not raised pending the multiplepinding, is disposed of by the fact that, of two riding claims lodged on, the defender’s claim one is still undetermined to the extent that the expenses in that riding claim are not yet ascertained, and a final interlocutor has still to be pronounced in the action of multiplepinding (*Baillie v. Hume*, Dec. 17, 1852, 15 D. 267).

R. B.

The defender appealed to the Sheriff, who dismissed the appeal, affirmed, and remitted to the Sheriff-Substitute to proceed.

Note.—The question here at issue relates mainly to the application of what is known in law as the doctrine of “Reconvention.” According to this doctrine, borrowed, as it would seem, from the later Roman Law—Faber, *Conjecturarum Juris Civilis*, 20, 5, No. 1, Mr. Erskine writes, Book I. tit. ii. sec. 20, Note c. :—“Jurisdiction is said to be founded *reconvention* when a foreigner raising an action in the Courts of this country is thereby held liable to their jurisdiction in an action against himself at the instance of the party he has himself pursued.” See also Huber, *Praelectiones Juris Civilis*, Liber XI. tit. ii.; Erskine’s Principles (by Rankine), p. 16; Trayner, *Maxims* (3rd edition), h.v.; Bell’s Dictionary and Digest (by Watson), 7th edition, p. 890.

In the leading case of *Thompson v. Whitehead* (Jan. 25, 1862, 24 D. 331), the Lord Justice-Clerk (now Lord Justice-General) Inglis said: “It appears to me on a review of the cases that the law of Scotland, like the law of Rome, permits reconvention out of favour to a defender, that he may not be condemned to pay without his having at the same time an opportunity of enforcing his demand against the pursuer; that, like the law of Rome, it restricts the defender’s privilege to those cases where the subject matter of the two claims is of the same nature, where they can conveniently be tried at the same time, and can be brought to a conclusion by one judgment (as in conjoined actions), or by two separate but contemporaneous or nearly contemporaneous judgments; that, subject to these restrictions and conditions, the law of Scotland, like the law of Rome, will admit reconvention not only where the two claims

arise in *codem negotio*, but also where they arise *ex diversis causis*, provided they be claims which can fairly be set against one another without violating some other rule of pleading or principle of equity; that the law of Scotland, like the law of Rome, will never allow reconvention to operate so as to give a judge jurisdiction over a subject-matter to which he is not otherwise competent, or indeed so as directly to confer or create jurisdiction in any case; and that in all matters of detail the right of reconvention will be limited or enlarged by a reference to the broad principles of equity on which it is based, in its bearing on the circumstances of each particular case."

These principles have been followed in a large number of cases; as, for example, in *Morison*, Dec. 8, 1866, 5 Macph. 130; *Barr*, Nov. 18, 1879, 7 Rettie 247; *California Redwood Company*, July 20, 1886, 13 Rettie 1202; *Goodwin*, Dec. 8, 1871, 10 Macph. 214; *Mackay's Practice* I. 177.

As regards the application of these and similar authorities to the present case, a fundamental question arises, viz. how far such an action is competent in the Sheriff Court. This important question has, in the opinion of the Sheriff, been nowhere better stated than by Mr. Dove Wilson in the fourth edition (1891) of his work on Sheriff Court Practice, pp. 79-82, where he writes: "The rules as to reconvention have been developed in the Supreme Court, and there are no decisions expressly deciding that they are applicable to the Sheriff Courts. It is here necessary to distinguish between two sets of persons liable to be reconvened; between foreigners not residing in Scotland, and persons resident in Scotland but not in the particular Sheriffdom. In the case of foreigners the principles will apply exactly, and the practice is to sustain the jurisdiction by reconvention." In a footnote, he adds: "*Burr v. Smith* was a Sheriff Court appeal, but the objection that reconvention was not competent in the lower Court was not taken." See also Lord Deas' opinion in *Thompson v. Whitehead*, *supra*.

He adds: "In *Goodwin v. Purfield*, Dec. 8, 1871, 10 Macph. 214, the Court of Session proceeded on the footing that reconvention as against foreigners applied in the Sheriff Court. In the Sheriff Court of Renfrew, it was held (in an instructive judgment) that it did—*Stewart v. Jarrie*, 1873, XVII. *Journal of Jurisprudence*, 607. The same has more than once been held in the Sheriff Court of Aberdeen."

Viewing the whole circumstances, the Sheriff has come to the conclusion that in the present case, although certainly one of some nicety, the equitable doctrine of reconvention applies, and that the judgment of the Sheriff-Substitute is well founded. A. F. I.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The new Lord President.—As was generally expected, the Lord Advocate of the day has availed himself of the rare opportunity offered, and has himself accepted the vacant office of Lord Justice-General for Scotland and Lord President of the Court of Session. The prize was too tempting to be refused; and, accordingly, the grumblings of party whips about the awkwardness of occasioning another bye-election at this time have been disregarded, while the flattering rumours of reluctance to lose Mr. Robertson's services in Parliament, so widely circulated, have been proved to be without foundation. The post is the most honourable, the most influential, and in every way the most important of all the offices open to Scottish lawyers. To have it again filled as we have learned to know it, we should again require the rare combination of talents, qualities, and learning which characterised the late Lord Justice-General in so marvellous a degree. We cannot, of course, look to see his lordship's shoes filled in this generation—any successor of his must needs stand *ex longo intervallo*; nor need we go so far as to say that the new Lord President is pre-eminently the best qualified of those available for the post. As Lord Advocate of the day, he was not only thoroughly entitled by precedent to step into the vacancy; he is, besides, a man of solid ability. It

has been a sort of fashion, no doubt, with a section of the press to write of him in terms of exaggerated and fulsome eulogy—attributable to his attractive appearances on the platform, where fluency and readiness always tell. But his fellow-practitioners know that behind this bubble reputation, Mr. Robertson has substantial powers. He has been a skilful and successful pleader; and, applying to legal problems a mind of such grasp and quickness as his, he cannot fail to fill the President's chair with credit and with advantage to the country.

* * *

The new Law Officers of the Crown.—The elevation of Mr. Robertson to the Bench brings in its train a series of changes. Sir Charles Pearson, Q.C., M.P., who succeeds to the Lord Advocateship, has given proof of his powers as Solicitor-General, and will be most popular in his higher office. It may be hoped that he will prove less subject to London influences than his predecessor, and will not jauntily acquiesce in the annual shunting of the Scottish Private Bill Procedure Bill. Mr. Graham Murray is the new Solicitor-General. Mr. Murray brings to the service of the Crown a knowledge and skill in law which are certainly not surpassed by any member of the Scottish Bar. His appointment means the addition of a tower of strength to the Crown Office, and also—although that does not concern us in these pages—it will mean a welcome and powerful addition to the debating power of his party, should he be returned to Parliament.

* * *

Relatives practising before Relatives.—Certain of the law periodicals in England and Ireland have been greatly exercised of late over the iniquity of sons, who are counsel or solicitors, practising before their fathers, who are judges. They have carried the objection, indeed, to all the forbidden degrees of relationship detailed in the Prayer-Book. There have been editorial comments not a few, and very many letters. Justice, they say, with wonderful unanimity, cannot be done where such a practice prevails. The best intentioned judge must inevitably be betrayed unconsciously into favouring the side on which

his relative appears. *A priori*, we should not have thought this likely. The practice, it is true, is not common in Scotland. Few of our few judges have relatives at the bar or amongst the solicitors. Proportionally fewer still of our Sheriffs—if indeed there be any such at all—have relatives who are practitioners in their courts. But the prevalence of the practice in England has been the ground of much complaint, and there it would seem to be really an evil. It is specially common in County Courts. Amongst the most recent letters on the subject is one addressed by a correspondent to the London *Law Times* of 19th September. The writer points out that in Ireland, Sir Michael O'Loughlen, Master of the Rolls, absolutely forbade his son to practise in his court, having before him the warning of a scandal during his own days at the bar. When Mr. O'Grady, Chief Baron of Exchequer in Ireland, and afterwards Lord Guillemore, was on the bench, his son specialised in his father's court. "A brief to move a motion of course in the Exchequer was sent to a Mr. Cooper, afterwards one of the Benchers of the Irish Bar. The motion was refused by the Chief Baron, whereupon Mr. Cooper returned brief and fee to the solicitor, with the request that he should send them to Mr. O'Grady, who next morning moved the motion, which was immediately granted by his father, the Lord Chief Baron. 'Why, my lord,' said Mr. Cooper, who was in court, 'your lordship refused to grant this motion when I moved it yesterday morning.' 'But, Mr. Cooper,' said the Chief Baron unabashed, 'you must admit that Mr. O'Grady put the case in a different light.' 'Oh,' said Mr. Cooper, *sotto voce*, 'I presume in the light of the sun (son).' When the late Encumbered Estates Court in Ireland was first established about forty years ago, the practice in the court of one of the commissioners was virtually monopolised by his son and his son-in-law, who were retained on opposite sides to balance the judge's favour. It is very questionable whether in the long run judges' sons themselves benefit by practising before their fathers. More than one instance could be cited in which a thoroughly competent barrister, whose practice was almost exclusively confined to his father's court, lost that practice on the retirement of the judge on whose favour he was supposed to have a lien.

The men who gave him briefs, not from confidence in his learning and ability, but from the fact of his having a near relative on the bench, abandoned him on the retirement of his supposed patron—a clumsy and cruel method of atoning for their own loss of self-respect in having originally employed him."

Nor is judicial nepotism confined to this country, it would appear. According to the *Hawk*, "in Mauritius the majority of the judges of the Supreme Court and all the magistrates are Creoles, being drawn, of course, from a very small population, and all have relatives in the law. The father of the chief judge, for instance, is an attorney, and his son and two nephews are barristers. Mauritians with suits on hand, sharing the common belief that blood is thicker than water, think they will best forward their cause by employing connections of the judiciary, who are consequently overwhelmed with business, while better men cannot earn enough to purchase bread and cheese. Only one remedy has been suggested—the exclusion of Creoles from the bench; but that is worse than the disease, as it would certainly provoke a conflict of races."



Obligatio ex non Delicto.—For many reasons the following proceedings are worthy of notice. One day in August last, Mrs. A., while shopping in Glasgow, lost her gold watch, with gold chain, etc., attached. She reported the matter to the police. The same afternoon a boy found the articles, and handed them to the police. The boy's father *claimed* a reward of thirty shillings for his son! The lady thought this sum too large a reward; refused to give it; but stated that she was willing to give five or even ten shillings. The sequel was novel and startling. The report of the daily papers bears that "Superintendent Sutherland then decided to lay the matter before the presiding magistrate, and summoned both parties to attend." The "presiding magistrate" was one Bailie McLennan; and his sage words and Solomon-like judgment are thus described in the newspaper report. He said "that when an honest boy like that found a valuable article on the street and gave it up, it was a duty

to see him handsomely rewarded. If they did not do that, and the thing became public, they were just placing in the way of such youths in circumstances of this kind a temptation to be dishonest. He did not think the boy's father asked too much when he said thirty shillings. He complimented the boy on his honesty." Mrs. A., the instructive report concludes, "handed over" the thirty shillings. Now this humbly seems to us a most reprehensible piece of officiousness on the part, first, of the superintendent, and, second, of the magistrate. We shall welcome a reference to any authority which the latter had for obtruding, *qua* magistrate, his opinion in such a matter. But, further, the contention of the parent of this boy with the marketable honesty, and the opinion of the bailie giving effect to the same, are most objectionable. They proceed on the outrageous postulate that there is something specially meritorious in being honest; that honesty, instead of being the commonplace equipment of ordinary people, is more than one is entitled to expect in one's fellows! It is to hold with Hamlet, that "to be honest, as this world goes, is to be one man picked out of ten thousand." This is a pernicious doctrine. By all means recompense a person for trouble in restoring to its owner lost property which he has found, and for any incidental expenses in connection therewith. That is only morally and legally his due. But to reward a boy for not appropriating lost property, and to heap doubtful compliments on him for not having played the part of a thief, are scarcely a proper part of the *nobile officium* of the great institution of Bailiedom. As well compliment and reward every individual who travels alone in a railway carriage with a weaker person and nobly refrains from taking his life.

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Codification of the Law.—When is the happy evening to come round on which the House of Commons is to address itself to reducing our intricate, inconsistent, and most voluminous law to the shape of a simple, short, and intelligible code? As a seasonable system of relief works for the needy and briefless, the undertaking ought to be hurried forward with despatch. It is the only unfailing means yet suggested

of provoking anything like general litigation among the community; and, with a rather languishing stock of business in the law courts and an unceasing inflow of new practitioners, there is surely no time to lose. We have been promised this of old; and again some vacation writers have hit upon it as a subject. A year or two have passed since a member of this present Parliament informed those who were then about to become his constituents, that in his sagacious opinion every man must be allowed to be his own lawyer; that it was a scandalous thing that the proverbial honest son of toil should require to consult lawyers in order to learn the law of his country on any point; and that he, the candidate, wise beyond his fellows and well-informed beyond all legislators up till now, would insist on having the law reduced to a code so simple and free from technicality that even the least intelligent of the intelligent electors should readily understand it, and of dimensions so modest that he (the least intelligent elector) could carry it in his waistcoat pocket. And ever since then the briefless ones have hungrily looked for the advent of so certain a parent of litigation as this promised measure. The reformer and his sympathisers have, however, still delayed—as is not unnatural, seeing that this was but a trifling part of their drastic programme of reform. Alas for the lawyers! This renewed attempt to bring about what would be for them a veritable El Dorado is not likely to prove successful.

Special Articles.

FREE LAW.

To the September number of the *National Review*, Mr. J. Acton Lomax, contributes an article on "Free Law." We are unable quite to decide whether the author intends that his proposals shall be taken seriously. Possibly he does not. If not—then we have only to express our enjoyment of an interesting and racy paper. If, however, the scheme is put forward as a practicable suggestion,—which we are inclined to believe it is,—then, in our humble opinion, not only is

the plan as stated crude and unworkable; the idea itself is visionary.

The ground on which Free Law is advocated is, that at present there is no equality before the law for rich and poor. True, the author humorously suggests that it would make an excellent battle-cry "in these days, when the prefix 'Free' seems to be the gilt that adorns all gingerbread, political, moral, and social, manufactured for public consumption—when our politicians tempt us with Free Trade, Free Education, and Free Land; our ecclesiastics with Free Churches; and our advanced moralists with Free Thought and Free Love." But the scheme is set out as a remedy for this alleged evil,—the effect of the existing judicial *system* (for he casts no reflection on the profession),—that there is one law for the rich and another for the poor. In the original community every man was his own lawyer, since the laws were simple and within the grasp of all. But as they increased in intricacy and volume, and as precedent came to have influence in their administration, the layman could no longer safely trust to his own knowledge and skill when he got into legal difficulties. Special training was required adequately to understand and recollect the law, and, following the universal principle of the division of labour, there gradually arose a system of paid advocacy. "From the day that the first fee was given to the first advocate for his services, the equality of the law for rich and poor alike was undermined." In England, says Mr. Lomax, this system has involved itself "in such a network of intricacy and cabalistic jargon, that the expense of putting its machinery in motion, and of arriving at a solution of the technicalities and obsolete formulæ on which it lives, has passed into a byword and a proverb." It may be remarked in passing, that this is surely a layman's, an unobservant layman's, view of the work carried on in the law courts. That the labour of lawyers is entirely or largely given up to intricate and recondite points of practice, or to the elucidation of musty rules of law, is a delusion which may be dispelled by skimming the headnotes in the reports. Recent legislation, the skilful handiwork of those all-wise modern reformers with whom our land is so plentifully blessed, is the most prolific source of litigation—

assuredly not the *dicta* of bygone judges or legal doctors. Nor any longer can the procedure employed be fairly described as intricate—as more complicated, for example, than the preliminary steps to be taken when one resolves to be regularly married, or to secure qualification under the lodger franchise. The best proof of its simplicity is, that in Scotland so considerable a number of lay litigants conduct their own suits from service to judgment without professional aid.

In the paper in question, however, Mr. Lomax does not aim at so reforming the law as to render it possible for every man to become his own lawyer. That, apparently, is to come later, as we gather from his concluding sentences. What he wishes meantime is Free Law, and by free law he means free lawyers. By free lawyers, again, he means State-paid lawyers, just as free education means State-paid teachers. Until there are State-paid lawyers, he believes, there cannot be equality of law in every respect for rich and poor. If we have this already, as some allege, why is it, he asks, that a celebrated Q.C. requires a fee of £1500 to lure him into court, while a junior is content with £50? The Q.C. is more skilful, and it is necessary to pay a large fee to secure his services. "But if justice depended more on its own merits and less on the jugglery of counsel, and if the man who was engaged in legal proceedings had equal hope of gaining his case by employing a junior member of the Bar, he would assuredly choose the latter in preference to the more expensive *confrère*." The inference here is scarcely warranted by the statements on which it is based; the view is at least too strongly put. In our opinion the influence of an advocate on the decision of a case is commonly much exaggerated. That influence is not nearly so great as is popularly supposed. In reality it is slight, and, unfortunately for Mr. Lomax's contention that the effectiveness of "the jugglery of counsel" is the result of "the network of intricacy and cabalistic jargon" with which law is surrounded, this influence is slightest just where the technicality is greatest. In the Scottish courts, at least, where jury trial is the exception, and trial before a judge alone is the rule, the influence of counsel in the direction suggested is, we are persuaded, infinitesimal. Assuming that a case is plainly and fully stated, it matters

little whether £100 or £10 be the fee. The judges know their work, and will do their duty, no matter how much they may for the time be interested in and relish an ingenious effort on the part of an advocate. The Bench is not much influenced by counsel. Where "the jugglery of counsel" really tells is in the power of putting *facts* before a Jury, where no abstruse points of *law* arise,—a field where the same opportunity would exist even were law reduced to-morrow to the ideal code which some reformers intend to introduce when they have a spare hour or two for the work.

The direction in which, according to the article in question, reform is to proceed is, "that the entire Bar should be reconstituted as a branch of the Civil Service, and a scheme devised of State-directed prosecution and defence which should extend to all lawsuits the principle which determined the appointment of a Public Prosecutor." This would indeed be a far-reaching reform. It would be an entirely new departure for the Civil Service. There is at present no branch of that department which deals with subject-matter even remotely analogous to the contentious work of the law which it is here proposed to assign to it. That, however, is no valid objection to the change, if it be in itself desirable and practicable.

Mr. Lomax anticipates two objections to his scheme. First, every litigant would try to obtain the service of celebrities in the profession. That is obvious. Since a plaintiff would not have to pay the fee himself, he would naturally, with praiseworthy and handsome generosity, choose the famous Q.C. who requires the fee of £1500, disdaining to be parsimonious in a matter in which he is so nearly concerned. To meet this, Mr. Lomax proposes to "abolish or to curtail within very narrow limits" the choice of counsel by the litigant, and to assign a due proportion of work to every member of the Bar; and, further, to guard against the possibility of the comparative tyro being pitted against the experienced practitioner. This is good news for the briefless. A more general distribution of work amongst the profession is a reform which they have been singularly unanimous in advocating. Probably, too, there are many with whom it will have no cogency to object that this proposal would be an interference with the freedom of labour, involving the same injustice, though in a slightly

different form, as that which is involved in a compulsory hard-and-fast "labour-day." But it may be an objection of some force with the disinterested and practical that no scheme of the kind would be effectual in preventing a selection of counsel to some extent. If counsel are to take up cases by regular rotation, then there will be manœuvring on the part of intending litigants. They will delay their cases, or accelerate them, so as to fall into the turn of the counsel they wish. In a modified degree this kind of manœuvring is practised in Scotland to-day in the case of Reclaiming Notes or appeals to the Inner House. A litigant who wishes to have his appeal heard by one Division and not by the other, studies the time of a transfer of causes from the one to the other, and seeks it or avoids it, as the case may be. Again, if the selection of counsel is to be determined by ballot, and each counsel is to have the same number of briefs, something of the same manœuvring will still be possible, as the list of unballoted men is reduced. In both cases, moreover, equality of law will not be secured, if that precious privilege depend on the mental equality of counsel. One man will still outshine his neighbours in natural gifts, and outstrip them in acquired skill. It will still be an object for a client to secure the services of A. rather than of B.; and the result of the proposed change, in whichever way it be carried out, will be merely to leave to the arbitrament of chance, or to the accident of priority in date, to determine on which side the superiority of talent shall be. There will be no truer equality then than now. Further, a hard task awaits the man or men who start out to adjust a system of fair "ties" between members of the Bar, so that "the comparative tyro" shall not be pitted against the "experienced practitioner." Mere seniority would be the most misleading of all criteria to apply in such a case; while a system of pass and promotion examinations, as Mr. Lomax suggests, would be productive of scarcely less ill-matched opponents. Any one who knows the *personnel* of the Bar will tell you that skill in practice and distinction at examinations are two widely different things; and further, that a dull man of fifty years' experience is no match for a sharp man in his first year.

The second serious objection to his scheme with which

Mr. Lomax deals is this: A scheme of State-paid law affords facilities to the quarrelsome and litigious man to rush to law for a mere bagatelle, at the expense of his more peaceful neighbour. It will therefore be necessary to constitute a tribunal which shall exercise a censorship in all cases before they are allowed to proceed. This, we presume, would be a Court somewhat after the model of the Scottish Reporters on *probabilis causa litigandi* in *poors* cases, and having their leading function to discharge. The purpose of the Court of Reporters is to throw out purely vexatious and groundless actions. But the duty is a delicate one. The power of veto has to be most sparingly exercised. Nevertheless, to guard against the bringing of utterly groundless actions or those merely vexatious would perhaps be possible. Where the difficulty, the impossibility, would arise would be in the case of actions which come under neither of these extreme categories, but which, while relevant and plausible, are still only daring and hazardous. It would be impossible before proof to throw out *ex facie* relevant cases—impossible without prejudging what the proof shall disclose. Yet few groundless or vexatious actions are irrelevant. Where they show their rottenness is in their failure to make good their averments.

An important omission from Mr. Lomax's article is any statement as to how expenses, other than fees of counsel and solicitors, are to be met. These usually bulk largely,—witnesses, productions, remits to men of skill, commissions, printing, etc. Apparently these items are all to be State-paid too.

There is, lastly, the consideration of ways and means. It is admitted in the article that the scheme would be costly. To meet this increased expenditure, Mr. Lomax makes two suggestions. The Court of Censorship, he thinks, might be empowered to inflict a fine on any complainant who wasted its time unnecessarily by bringing before it unfounded, vexatious, or malicious claims. This would be salutary, no doubt. It would be *almost* as effectual a deterrent to frivolous litigation as we have at present, in the dread of being mulcted in expenses. But then, as now, the deterrent, such as it is, would not affect the hot-headed or the wealthy (whom, presumably, Mr. Lomax most desires to reach), but

only the cool and the poor. His second proposal is suggested by the Succession Duties. "We have at present," he says, "large succession duties, varying from 3 to 10 per cent.; why should we not, on the same grounds, exact a percentage on money or property recovered under the system suggested?" This seems reasonable enough. In order, however, to meet the gigantic outlay involved in the scheme of Free Law, that percentage would have to be enormous. At present the costs of any suit bear a large proportion to the amount in dispute. No doubt, under Mr. Lomax's millennium, the aggregate annual "stipends" of the colleges of counsel and solicitors would be much less than the aggregate amount of fees at present paid in any year. But still they would be very considerable; and, if they were to be so defrayed, would eat up an appalling percentage of the property recovered. Look at it in any light, even were such a scheme practicable, its cost would be enormous. The author of the project seems to think that the result of its introduction would be to lessen the amount of litigation. At best it can only be a matter of conjecture; but our humble opinion is that the effect would be precisely the reverse. As we stand now, the consideration of the inevitable "extra-judicial expenses," not to mention the risk of judicial expenses too, is the most active preventive of going to law. Hundreds of good claims remain unenforced, hundreds of unquestionable rights are suffered to be infringed, solely in dread of that inevitable blackmail. Were this removed—and that is precisely what Mr. Lomax's scheme is intended to achieve—litigation would, we venture to think, enormously increase.

In referring our readers to the *National Review* article itself for a nearer and fuller view of its author's ingenious proposals, we shall only say that something not nearly so far-reaching is wanting. The evils which exist affect rich as well as poor—rich, we think, in some cases, more, as in some cases less, than poor. They arise from "speculative litigation," levelled often by needy adventurers against wealthy companies, and worked up often by needy solicitors against wealthy employers. An end ought to be put to this system of blackmailing. How that may be attained we humbly confess we do not clearly see. In the matter of extra-

judicial expenses, however—a great and growing evil—a first step in the direction of remedy must be found in the adoption of very different principles in the taxation of accounts from those at present followed. J. C.

EX DEBITO NATURALI.

THE simple fact—*Caius Balbi filius*—binds these two with a chain of obligation *ex debito naturali*. Balbus is linked to Caius, and Caius to Balbus, by a chain of natural obligations, in which each is alternately debtor and creditor, and this without convention between them, or the exercise of discretion on either side. The *birth* of Caius is the foundation of a variety of claims, which may afterwards emerge in consequence of the natural obligation originating at that date. These varieties are so various, and the chain becomes twisted and involved to such a degree, that confused thought and conflicting decisions have resulted from attempts to disentangle it, made without giving due weight to the general principles on which the obligation rests. The discussion of those general principles may profitably occupy our attention for a brief space.

It has first to be noted that the phrase *ex debito naturali*, as applied to claims arising from natural obligation, is apt to be misconstrued, for the reason that the term “natural” is used to express divisions of obligations as these are arranged in two distinct systems of classification. By *obligations merely natural*, as opposed to *obligations merely civil* and *obligations mixed*, the civil law understood those engagements wherein one person is bound to another by the law of nature only, and which cannot be enforced by an action (Erskine, *Inst. B. III. T. i. § 4*). On the other hand, by *obligations natural*, as contrasted with *obligations conventional*, Lord Stair understood those duties which a man is bound to perform, although they are not grounded upon any anterior cause, contract, quasi-contract, delict, or quasi-delict, but simply upon his natural position (Stair, *Inst. B. I. T. iii. § 2*). We use the term “natural obligation” in the sense in which it is employed by Stair.

Birth being the foundation of the obligation, it follows that, before two persons can be debtor and creditor in it, a *birth* or *natural relationship* must subsist between them. By a "natural relationship," we mean the direct blood relationship which nature establishes by the fact of birth. As the right to be alimented arises only where there is a natural relationship between two persons, so it cannot subsist where there is no natural relationship. Lord Fraser in his treatise on *Parent and Child*, p. 85, states that the obligation of parents to aliment, nourish, and support their children does not depend upon any presumed contract or arrangement of parties, but is one of the provisions of nature. It is a consequence of this natural basis of the obligation that it passes from one debtor to another according to birth relationship, and not according to the rules of heritable or moveable succession. The rotation of liability is—(1) The indigent person's descendants, children, grandchildren, etc.; (2) his father; (3) his mother; (4) his grandfather; (5) his grandmother—and so forth. Now it will be observed that, on the one hand, the female kindred—daughter, mother, grandmother, etc.—incur a liability to aliment which bears no proportion to their rights of inheritance; and, on the other hand, many relatives—brothers, sisters, uncles, and cousins—have a right of inheritance, but incur no liability to aliment. The two rights rest upon entirely separate grounds. "Each class of obligants," says Lord Fraser in the passage above referred to, "must be exhausted before the immediately succeeding class of obligants can be made liable, and it must also be shown that there is no one who represents any member of the first class, and who would on that account be liable *ex jure representationis*." A convenient example of a doubtful class of claimant is a son's wife or widow claiming aliment from his father. Applying to her case the principle stated above, and looking at her as an individual apart from her husband, and in the absence of children, it is apparent that she has no natural relationship to her husband's father, and can have no claim to be alimented by him. Failing her husband and children, her natural relationship is towards her own father, mother, and direct ascendants (Fraser, *Husband and Wife*, 2nd edition, p. 863).

We have said that the obligation is founded upon the fact

of birth; but all natural obligations thus founded do not necessarily become operative. It is only when the creditor in the obligation is unable to support himself that the obligation is converted from a mere passive liability into an active claim. It is the *need* of the creditor which renders active a tie that has existed since the birth of the younger obligant, although it may have lain dormant. Indigence and want combined form an element essential to such a claim (Bell's *Prin.*, § 1630). It must further be observed that it is the *real* creditor in the obligation who has to be in want. If a married son becomes indigent, an obligation arises against his father which may compel the latter to aliment both the son and his wife. But if the son and his wife are living separate, the indigence of the wife alone does not found a claim against the son's father. The son, not the wife, is the real creditor in the obligation, and it is the former who must be in want before the obligation can be enforced.

Equity does not permit any one to be called upon to perform an impossibility, and therefore the law does not require the needy to support the indigent. A superfluity of means on the part of the person against whom an alimentary claim is made is necessary before the right to be alimented can be made effective. The debtor in the obligation must not only have a superfluity of means after providing for his own maintenance, but also a superfluity after providing for the support of those naturally related to him by a nearer tie than that which links him to the supposed claimant. But a man is not at liberty to spend his means in alimentering those related to him in a more remote degree, and then to oppose a claim at the instance of a nearer relative on the ground that he has no superfluity. The natural kindred have claims which must be met in their order, and, if there is not enough for all, the nearer relatives come first, then the more remote.

Cases of doubt frequently occur in which it is uncertain whether an alimentary obligation subsists or not. In such a case it is of advantage to consider whether there can be a reciprocity of obligation were the positions of debtor and creditor reversed. The question being,—Is Balbus, who has a superfluity, bound to aliment Caius, who is indigent? Reverse the query, and ask whether Caius, if he had means,

would be bound to maintain Balbus if in want. A father is obliged to aliment his indigent son; a son is obliged to aliment his indigent father. Here is true reciprocity. But let us take a more indirect case—that of the son's wife, already used as an illustration. Can it be maintained that a man is entitled to claim aliment from his son's wife apart from her husband? The claim of the father-in-law being untenable, that of the daughter-in-law is equally bad, because there can be no alimentary obligation between two persons which is not reciprocal. In *Hoseason v. Hoseason* (21st October 1870, 9 M.P. 37), the late Lord President Inglis seems to have had this difficulty in view, when he pointed out the doubtful propriety of extending the alimentary obligation beyond established limits; and it will be observed that, although the question in the case of *Hoseason* related to the rights of a son's widow, his lordship used the expression "between a father and his son's wife" in explaining the reciprocity of which he was thinking.

In brief, therefore, it may be said that, to lay a relevant foundation in fact for a plea-in-law based on the obligation to aliment *ex debito naturali*, the claimant must aver and be prepared to prove—(1) That there is a natural or birth relationship between him and the person against whom he is making the claim; (2) that he is in indigence and want; (3) and that the person from whom he claims aliment has a superfluity of means. It is hardly needful that we should point out that alimentary claims between husband and wife rest upon a different ground, arising out of the matrimonial relationship, and not *ex debito naturali*. Consequently, claims of that description do not fall within the scope of our present discussion.

H. H. B.

THE TRIAL OF STEWART OF ACHARN.

IN the last published volume (XVI.) of the *Transactions of the Gaelic Society of Inverness*—not usually, perhaps, the well of topics specially legal in their interest—will be found a paper, by Mr. Macphail, advocate, which all lawyers will like to read. It is entitled, "Notes on the Trial of James Stewart of Acharn." The author points out that the printed

report of this trial of "James of the Glens" is the basis of much of Mr. Robert Louis Stevenson's well-known story, *Kidnapped*. In 1745 the last of the Stewart lairds of Appin was a child of tender years. Ardsheal, the oldest cadet of the house, was tutor of Appin, and it was under him that the clan were "out." After Culloden, where they suffered very heavily, the clan dispersed, Ardsheal was attainted, but escaped to France. The management of the forfeited estates being vested in the Scottish Court of Exchequer, the local factor on Ardsheal was Colin Campbell of Glenure. A touching proof of the loyalty and devotion of the clansmen is to be found in the fact that, besides the judicial rent which had to be paid to the Court through Glenure, the tenants regularly raised a second rent, which they sent to the laird in France. This voluntary rent was seen to by James Stewart, a near relative of Ardsheal, who occupied Glenduror, and was known as Sheumas-na-Glinne. Mr. Macphail thinks that there is no evidence for calling him a natural brother of Ardsheal, as he is described in the printed trial. Having been deprived of Glenduror, James Stewart managed to get Acharn, a place in the neighbourhood. In 1752, Glenure made up his mind to clear out a number of Ardsheal tenants, and to replace them with his own dependants. Acharn brought the matter under the notice of the Barons of Exchequer; and when the Court of Session, on technical grounds, refused interdict, the tenants, by James Stewart's advice, resolved to stick to their holdings, in the belief that Glenure's conduct would be repudiated by his superiors. The evictions were fixed to be carried out at Whitsunday, but on 14th May, as Glenure, with a servant, a sheriff-officer, and an Edinburgh writer, were passing through the wood of Lettermore, he was shot from behind by a man who instantly disappeared.

"Years before this," says Mr. Macphail, "there had died a decent man, Donald Stewart, leaving his children to the care of Ardsheal and James of the Glens. One of these children, after giving a good deal of trouble to his guardians, enlisted in the Royal forces, deserted to Prince Charlie at Prestonpans, and after Culloden made his escape, and apparently obtained a commission in the French service. After things had quieted down a little, he occasionally came over to Scotland, wan-

dering about among his friends in Appin, Rannoch, and elsewhere, but keeping carefully out of the way when any English soldiers happened to be in the neighbourhood. Such, up to this date, was the history of Alan Breck Stewart, whom Mr. Stevenson has now rendered immortal. Upon him suspicion at once, not unnaturally, fell, for he was known to have been in the country for some time, and, like many another of his name, to have spoken evil things concerning Colin Roy. But not a trace of him could be seen, in spite of the most industrious search, and so the rage of the Government and of Glenure's friends had to look for another victim. For some days before the murder, Alan had been living at Acharn, and it was suspected that his escape had been facilitated by his former guardian. Accordingly, James of the Glens was arrested and carried off to Fort-William, where he was imprisoned for several months, while no stone was left unturned to concoct evidence against him. In the upshot, he was indicted as art and part with Alan in the murder, and placed on his trial at Inveraray Circuit.

Archibald, third Duke of Argyll, long known as Earl of Islay, was at the time titular Justice-General, and he took full advantage of his position to prevent any chance of an acquittal. The Lord Advocate, William Grant of Prestongrange, also lent himself to the plot, as is admitted by Mr. Omond in his book on *The Lord Advocates of Scotland*, though palliating circumstances are urged on his behalf. In Mr. Omond's words, "The proceedings from the first were unfair. There was a standing feud between the Campbells; yet the trial took place at Inveraray, where the Duke of Argyll was supreme. There were two judges of the Court of Justiciary present, but the Duke, then Justice-General of Scotland, sat as a judge, though he had never been in the habit of so doing. The Lord Advocate went to Inveraray, and conducted the prosecution in person, although it was said no Lord Advocate ever appeared in a Circuit Court before."

Glenure had been married to one of the Mackays of Rig-house in Sutherland, a niece of the fourth Lord Reay, and the indictment, which took the form of criminal letters, was at the instance of the widow and her children, as well as of the Lord Advocate; and so far did the malice of the private

prosecutors carry them that attempts seem actually to have been made to hamper the prisoner's defence by retaining all the leading members of the Bar, and so deprive him of their assistance. The Court met on 21st September. The judges were the Duke of Argyll, who presided, and Lords Elchies and Kilkerran. The prosecuting counsel were the Lord Advocate; James Erskine, then Sheriff of Perth, afterwards raised to the bench as Lord Barjarg; Mr. Robert Campbell of Asknish, head of the M'Ivers, and who, according to Douglas, "was brought up to the Bar under the particular tuition of Archibald, Earl of Islay, afterwards Duke of Argyll, and possessed much of the confidence and friendship of that great man as long as he lived;" Mr. John Campbell, yr. of Levenside, afterwards well known as a judge under the name of Lord Stonefield, son of Archibald Campbell of Stonefield, who had been commissioner on the Argyll estates, and was at this time Sheriff-Depute of the county; and a very virulent gentleman rejoicing in the somewhat chequered name of Simon Frazer. According to the *Scots Magazine*, this was "Mr. Simon Frazer, commonly called the Master of Lovat, lately called to the Bar," and there are good reasons for believing this statement to be correct. In 1745, while but a student at the University of St. Andrews, the Hon. Simon Frazer of Lovat was sent for by his father, and practically compelled to join in the rising. For a year or two thereafter he was kept in a sort of honourable captivity in Edinburgh and Glasgow, until, in 1750, he received a free pardon. During his whole subsequent career he lost no opportunity of ingratiating himself with the Government, with the result that the Lovat estates, though not the title, were restored to him. The otherwise unaccountable virulence which characterised this his first appearance at the bar is thus capable of easy, if not very creditable, explanation. The defence was in the hands of George Brown, Sheriff of Forfar, and four years afterwards a judge under the name of Lord Coalstoun; Thomas Miller of Glenlee, Sheriff of Kirkcudbright, and afterwards successively Lord Advocate, Lord Justice-Clerk, and Lord President of the Court of Session; Robert Macintosh, son of Lauchlan Mackintosh of Dalmunza (who was minister of Dunning and afterwards of Errol), an able but

very eccentric advocate, whose career is sketched at length in the *Ochertyre Papers*; and Walter Stewart, yr. of Stewarthall, regarding whom Mr. Ramsay has also preserved some information. Objections were taken to the relevancy of the indictment, discussed at great length, and of course repelled. Then the jury was empannelled. In those days the presiding judge nominated the jury, while the prisoner had no peremptory challenge, so that it is not surprising that out of the fifteen selected eleven were Campbells. Two gentlemen of the name, indeed to their credit, it is said, refused to serve, on the ground that their minds were biassed against the prisoner; but the others had no such scruples. And so the trial went on. Even against Alan Breck the prosecution, with all their efforts, made but a shabby case, while against his alleged accomplice not a single scrap of reliable evidence was adduced. But the Duke had picked his men well,—one of them, Duncan Campbell of Southhall, even trying to stop the speech of counsel for the defence,—and he was rewarded with a unanimous verdict of guilty. His passion, which had been smouldering throughout the trial, now broke forth into insolent abuse as he addressed the unfortunate man, whose blood he must have felt was on his head. Mr. Omond's idea is that the Government were terrified lest the murder of Glenure should be seized upon by the Duke of Cumberland and the rancorous gang under his control, to force them to abandon their policy of conciliation; that they felt that somebody must hang, and did not care very much whether he were innocent or guilty; and, in short, that the conviction of James of the Glens was in their eyes a political necessity. "Therefore," says Mr. Omond, "in order to secure a conviction, Stewart was tried at Inveraray, where he was amongst his enemies, the Lord Advocate appeared in a Circuit Court to press a charge founded on insufficient evidence, a packed jury was put into the box, and the Duke of Argyll presided on the bench." There may very well be some truth in this view. The Lord Advocate had no special enmity towards the prisoner, and it is on his behalf that this excuse is urged. But it is impossible to believe that in the mind of the Justice-General, though these considerations may have had a place, there was not also direct personal rancour against the

prisoner as representing an odious race, and as having been hatefully loyal to the vanished Ardsheal. The only defence, if defence it can be called, ever made for His Grace has been preserved by Lord Cockburn in his *Circuit Journeys*. A loyal Campbell, who had the hanging of James Stewart flung in his teeth, retorted with some pride that anybody could get a guilty man hanged, but only Mac-Chaileinn-Mor, a man who was innocent! The sentence of the Court was that, on 8th November, James Stewart should be hanged on a gibbet to be erected "on a conspicuous eminence upon the south side of and near to the said ferry" of Ballachulish, "until he be dead, and thereafter to be hung in chains upon said gibbet." On 5th October the unfortunate man "was carried from Inveraray to Fort-William tied on a horse, and guarded by eighty soldiers;" and on 7th November, under a still stronger escort, he set out to meet his doom. "The command of soldiers escorting the prisoner," to quote from the *Edinburgh Courant* of 21st November 1752, "came to the north side of the ferry upon the evening of the 7th, but it blew so hard that they could not cross till the morning of the 8th. The prisoner was attended by Mr. William Caskill, minister of Kilmalie, and Mr. Couper, minister at Fort-William, and a few of his friends. A little after twelve they got to the place of execution, where was erected a small tent that contained the two ministers and the prisoner, and after a short prayer by one of the ministers the prisoner produced three copies of a speech, one of which he gave to the Sheriff-Substitute of Argyllshire, another to Captain Welch, the commanding officer, and asked leave to read the third copy, which, being granted, he with an audible and distinct voice read a very extraordinary speech; and when he had done reading, gave the third copy to Mr. Douglas, Sheriff-Substitute of Inverness." Then ensued an unseemly wrangle, the Sheriff-Substitute of Argyllshire maintaining that various statements in the speech were untrue. Finally, "the prisoner kneeled and read a very long written prayer, and then the other minister sang psalms and prayed. The prisoner took leave of his friends, mounted the ladder with great composure and resolution, and read a short written prayer with an audible voice. The storm was so great all this time that it

was with the utmost difficulty one could stand upon the hill, and it was near five before the body was hung in chains. There were a great number of the country people present; and sixteen men of the command in Appin were stationed at Ballachulish to prevent the gibbet being cut down." Little wonder that people in Appin still show you where James of the Glens was done to death, and declare that the very grass refuses to grow on the accursed spot.

Appointments.

THE RIGHT HONOURABLE JAMES PATRICK BANNERMAN ROBERTSON, Q.C., M.P., LL.D., Lord Advocate, has been appointed Lord Justice-General for Scotland and Lord President of the Court of Session, in room of the late Lord Justice-General Inglis. Mr. Robertson was admitted a member of the Faculty of Advocates in 1867. He was appointed Solicitor-General in 1885, and became Lord Advocate on the elevation of the present Lord Justice-Clerk to the bench in 1888. The new judge was member for Buteshire.

Obituary.

MR. ANDREW M'GEORGE, LL.D., Writer in Glasgow, died at Row, on 4th September, in his eighty-second year. The deceased gentleman, who was one of the leading solicitors in the West, was very learned in church law; and before the abolition of patronage in Scotland he was engaged in many cases of disputed settlements.

MR. DAVID STOBIE, Solicitor, died at Haddington, on 5th September. He was the oldest practising solicitor in East Lothian, being over eighty years of age. Mr. Stobie was Procurator-Fiscal for the Burgh of Dunbar.

The Month.

The Late Lord President Inglis and Society of S.S.C.—

The following letter was addressed by the late Lord President Inglis to the President of the Society of Solicitors in the Supreme Courts of Scotland on 18th February last. The Society had requested his lordship's permission to place his portrait in one of the stained glass windows to be inserted in their new library building—explaining that all other portraits in these windows were to be of eminent men now deceased, but that there was a wish to make an exception in the case of his lordship, the Lord President of the Court. The window has not yet been erected, but the stained glass will be inserted in nearly all the windows within a few weeks:—

“EDINBURGH, *February 18, 1891.*

“DEAR SIR,—I have received your letter of the 12th, with accompanying drawing. I feel much honoured by the proposal made by you on behalf of the Society of Solicitors before the Supreme Courts.

“But I trust you have not forgotten the wise counsel given by a great lawyer and a great lawmaker,—Solon to Cræsus, King of Lydia, in the height of his prosperity,—that no man's life could be pronounced altogether happy till its close.

“The moral is, that whatever a man's eminence may be during the greater part of his life, it may be all blotted out and destroyed by some fatal lapse before he dies.

“This is the principle on which men refrain from erecting monuments or permanent memorials to persons who are still living, and it is a sound principle, confirmed and fortified by experience.

“With this caution and protest, I leave myself in the hands of the Society.

“I will not undertake to fulfil Solon's condition of becoming altogether happy by predecease of the execution of your stained glass windows, though such an event is by no means unlikely.

“As regards the most appropriate likeness, I think I had

better refer you to my son, Mr. A. Wood Inglis, Secretary of the Board of Manufactures, to whom I have handed the drawing which accompanied your letter.—I am, dear Sir, yours faithfully,

“JOHN INGLIS.

“To the President of the Society of Solicitors before the Supreme Courts.”

* * *

Fiscal for Cromarty.—Mr. William Tavish Mactavish, Procurator-Fiscal, Tain, has been appointed Procurator-Fiscal for Cromarty, in place of the late Mr. James Grigor. Cromarty will thus be united to Easter Ross, and Mr. Mactavish will undertake the duties of the united districts of Easter Ross and Cromarty from Tain as a centre.

* * *

A Constitutional Monarch.—Henry VIII. cannot be charged with having unduly exercised the Royal prerogative. In the thirty-eight years during which he was upon the throne of England, no less than 72,000 criminals were executed.

* * *

Dipsomania in Belgium.—In one direction at least Belgium leads the way, and other nations would do well to follow in her steps. She is the only European country in which dipsomania is officially recognised as a form of insanity to be dealt with by the legal detention of its victims.

* * *

A Haven for Wife-Beaters.—There is a good time for wife-beaters north of the Tweed, if they can only be tried at Glasgow, and by Bailie Martin. The other day a young able-bodied man was charged at the Central Police Court before him with having beaten his wife with his fists. He pleaded not guilty. The wife, a most respectable-looking woman, carrying a baby in her arms, was the first witness called. Bailie Martin, addressing her, said: “Before going on with this case, in the event of your husband being found guilty, do you want him sent to prison?” The woman: “Yes;

he deserves to be punished." Bailie Martin: "As I have said oftentimes before, the woman that would send me to prison would never sleep again with me under the same roof." The woman gave her evidence in a clear, straightforward manner. She said her husband was continually abusing her, and he spent his means on drink. The other night, about nine o'clock, she went upstairs along with her little daughter. She knocked at the door several times, but got no answer. She then went and obtained a neighbour's key, and while she was opening the lock her husband came to the door undressed, pushed her away, and punched her side with his fists. She had seven of a young family, and she had to support herself and family mainly on her own earnings by doing washings and such like. The daughter, a most intelligent-looking little girl, gave corroborative evidence. Prisoner had no questions to ask, but was understood to say that "he thought she was another woman." The Assessor (Mr. T. P. Young): "This is a very bad case, in my opinion." Bailie Martin: "It is not a very bad case. I fine you 10s. 6d., or seven days." The Assessor threw himself back in his chair in evident astonishment at the sentence passed.—*Law Times*.



An Important Addition.—One of the quiet humorists of the English Bench is Mr. Justice Day. A saying is attributed to him as having been made at the recent Leeds Assizes which did not get into the reports. One witness deposed that the defendant spoke of the plaintiff as a "damned thief." The defendant's counsel at once interposed in correction, "A damned thief of a lawyer, my lord." "That addition," Mr. Justice Day said, in his calm and philosophic way, "renders the saying perfectly innocuous."



Extraordinary Sentence.—A man, John Cheseldine, has been discharged from Her Majesty's prison at Lincoln, by order of the Home Secretary, after having served six days' imprisonment out of the seven, for which period he was committed by Mr. Dymoke, one of the justices of the peace for the Petty Sessional Division of Horncastle. Cheseldine was charged

before Mr. Dymoke, under the Vagrancy Act, with sleeping in an outhouse without having any visible means of subsistence, and not being able to give a satisfactory account of himself. Cheseldine produced a note signed by Mr. Brackenbury, proprietor of the outhouse in question, to the effect that he had given him permission to sleep therein, and had also lent him some rugs on which to sleep. The magistrate declined to accept the letter as evidence, and committed Cheseldine to gaol for seven days, but promised to rehear the case if Brackenbury could be produced. In a short time Brackenbury attended the court, but Mr. Dymoke then refused to reopen the case. Mr. Boulton, solicitor, at once took up the case, and represented it to the Home Secretary, and asked for the immediate release of the prisoner, with the result as stated above. Cheseldine was sent home in charge of a warder.



Early Depravity.—An adjourned inquest was held on 23rd September before Mr. Clarke Aspinall, the Liverpool Coroner, touching the death of David Dawson Eccles, a boy eight years of age, who had met his death by drowning in a pit in the foundation of an unfinished building in Victoria Street on the 7th September. Two boys, named Samuel Crawford, aged nine, and Robert Shearon, aged eight years, are in custody for having caused the death; and the evidence exhibited some shocking depravity. The boy Shearon is the illegitimate son of Mary O'Brien, and on Monday he went home after being out two nights and two days, and his mother took his clothes off him to clean them, and put him to bed; but he shortly afterwards made his escape in some rags and a piece of sacking. Crawford and he met deceased, and took him to the pit in Victoria Street, which is protected by a high boarding. They managed to get the boy over, and, according to their own confession, they deliberately threw Eccles into the water, pulled him out, and then pushed him in again; and Crawford held him down with his head under the water for about five minutes until he was drowned. They state that he never stirred after, and the avowed object for their action was to steal the poor boy's clothes, which they

did, Shearon taking his jacket, trousers, and shirt. The jury returned a verdict of wilful murder against both the prisoners.

* * *

"Bonâ Fide" Travellers.—Our ubiquitous friend the *bonâ fide* traveller is likely to become as extinct as the dodo, if a recent decision of the Cheshire magistrates may be accepted as sound law; but if the decisions of the great unpaid during the past month have been as far removed from good law as they have been from common sense, it is probable that that much-abused individual is safe from present annihilation. The Nantwich magistrates have taken upon themselves the responsibility of discarding the definition of *bonâ fide* traveller in the Licensing Act, and in lieu thereof have introduced what the late Serjeant Ballantyne said "they were pleased to call their *ideas*." In the case under notice the defendants had travelled the requisite three miles, and were therefore "qualified" to obtain refreshment. The Bench were, however, of opinion that they had not done so for "business or pleasure," but merely for the purpose of obtaining drink, and that therefore they were not *bonâ fide* travellers within the meaning of the Act. Except the attendance at a funeral, otherwise than in the capacity of undertaker, we cannot conceive any errand upon which a person can embark which is neither in pursuit of business or pleasure; but apart from this, it is refreshing to find that the justices of the cheese county are not wholly devoid of these "ideas" to which the learned Serjeant refers. It is more than probable that this decision awaits the same fate as was meted out in the Macclesfield case—on the same subject—a few months back.—*Law Gazette*.

* * *

Criminal Appeals.—Mr. Poland, Q.C., who was recently interviewed by the representative of an evening contemporary upon the subject of the establishment of a Court of Criminal Appeal, is clearly of opinion that such a step is unnecessary. He pointed out that, in the course of his forty years' experience at the bar, he had not known of six proved cases of wrongful conviction, and he appears to think that, in regard

to these very isolated cases, the right which at present exists of petitioning the Home Office is a sufficient safeguard for prisoners. Mr. Poland bears strong testimony to the careful and thorough manner in which such petitions are dealt with by the Home Secretary and his subordinates, and is of opinion that if prisoners were enabled, as was proposed by the Lord Chancellor's Bill, to give evidence in their own behalf, the cry for a Court of Criminal Appeal would be much less heard. Coming from such an eminent criminal lawyer, these views, if not conclusive, are at least entitled to very great weight.—*Law Journal*.



A Scottish Grievance.—The London *Law Times* has the following:—"According to the *Edinburgh Evening News*, Mr. Sydney Buxton has unearthed a real Scottish grievance. The English Attorney-General and Solicitor-General were able, apart from private practice, to make—the former over £42,000 during the last four years, and the latter £37,000, while the Lord Advocate of Scotland had to content himself with £14,500, and the Solicitor-General with £5000. The Irish Attorney-General, on the other hand, netted about £24,000, and the Solicitor-General over £9000. The grievance does not end here, for, while the English law officers have abundant opportunities of practising at the London law courts while Parliament is sitting, the Scottish law officers are not so well situated, and have to content themselves chiefly with the ordinary emoluments of office. There is another aspect of the case, which is that if the retaining fees of the Scotch law officers are so much higher than their fees based upon actual litigious work done, the retaining fees may be too high."



Conflict of Interests—Inter - State Courtesies—Amenity.—"Some of our Western exchanges," writes the *Albany Law Journal*, "bring us the report of another judicial outrage. A few years ago the Legislature of South Dakota passed a very liberal divorce law, granting the decree after six months' nominal residence of the plaintiff within the State, for a great

number and variety of offences against the marital relation. It was the avowed purpose of this legislation to induce immigration by tempting those who were tired of the estate of matrimony to come for relief from its irksome bonds to the boundless Dakota plains, with the incidental advantages of a glorious climate, a prolific soil, and plenty of divorced people in society thrown in. The Act appeared to have the intended effect, and many to whom life under the Puritan *régime* of the East had lost its savour, betook themselves to the Promised Land beyond the great river, and got rid of husbands and wives (and eke of mothers-in-law). Now just when the fame of this State of easy divorce began to be spread through the land, and it was about to reap the Cadmean harvest for which it had so wisely provided, there arises a judge who utters some oracular words about 'the spirit of the law,' and 'domicile,' and '*animus manendi*,' and the like, and the whole structure so elaborately reared falls to the ground. Hereafter, as heretofore, divorces will be granted to new-comers in the order of their coming, but from this time forth only to such applicants as intend to comply with the spirit of the law, and propose to make their investment in South Dakota law and real estate a permanent one. That this will seriously interfere with the Dakota branch of that most profitable of Western industries—the divorce business—which has so largely contributed to the glory, material prosperity, and the rare social characteristics of the metropolis of that extensive region, cannot be doubted. It is said that a large number of Eastern people, who have been gracing the new State with their presence for some months past, waiting for the legal period of probation to elapse, are sadly preparing to return to the more rigorous conditions of matrimonial life and infelicity which prevail in the East. These people have our sympathy, and we quite agree with them in the opinion that the State of their present sojourn has obtained the benefits of their society and money by false pretences. But we are convinced, nevertheless, that Judge Aiken is right in requiring those who desire to avail themselves of South Dakota's liberal laws to render more of a *quid pro quo* than a six months' residence and the support of the divorce courts and attorneys. This is something indeed, but it is not enough, and we should be

glad to see the law amended so as to compel the successful applicant (and all applicants, we believe, are successful in that happy land) to reside in the State for at least five years after getting his decree. He might marry and be divorced several times in that time, to the enlarged prosperity of the State of his adoption. With such an amendment to the present divorce law, and a little legislation for the encouragement of gambling, we see no reason why South Dakota should not become one of the greatest, as it would surely be the most popular and famous, of the enlightened commonwealths which make up the great West."



Courts controlling Religion of Children.—The subject of the religion of children, or, rather, the ways and means of educating children in accordance with the doctrines of particular denominations of Christians, has latterly been brought into great prominence by the difficulties which Dr. Barnardo has endeavoured to solve through the aid of the charitable. From the cases decided, it is obvious that there are standing rules acted on by the Courts which seem somewhat harsh, or may be used to inflict occasional hardships on benevolent societies and managers. The common law, aided by statutes, has some leading principles to act upon when contending parties claim the custody and care of children during their early years, and Courts of equity act also on principles which practically govern the subject in most of the cases giving rise to litigation. And during the recent session of Parliament it has been enacted by the Custody of Children Act, 1891 (54 Vict. c. 3, sec. 4), that when a parent applies to the Court for the custody of his child, if the Court is of opinion that the parent ought not to have the custody of the child, and that the child is being brought up in a different religion to that in which the parent has a legal right to require that the child should be brought up, the Court shall have power to make such order as it may think fit to secure that the child shall be brought up in the religion which the parent has a legal right to require. But nothing is to interfere with the power of the Court to consult the wishes of the child in considering what order is to be made, or diminish the right

which any child now possesses to the exercise of its own free choice.

The power of the parent is thus appealed to as the standard or starting point for the control which a Court will exercise in such circumstances, and, fortunately, some recent cases of importance have involved very ample discussion of the rights of parents as regards the education of children in their own religion. The not uncommon case of a Protestant marrying a Roman Catholic naturally gives rise to this class of difficulties, for if the parents are wealthy enough they usually insert provisions in their marriage settlement, and if the parents are too poor to indulge in this luxury they usually contrive to come to some understanding as to how the education of the children is to be worked out. In 1873 a leading case of this kind arose under the title of *Andrews v. Salt* (L. R. 8 Ch. 636.) Thomas Andrews, a chemist and druggist, being a Roman Catholic, married Ellen Fleetcroft, a Protestant. Before the marriage the husband, in a conversation on the subject of children, told his future wife that he was quite willing that the girls should be brought up as Protestants and the boys as Catholics. Both the mother and father of the future agreed to this. In due time a boy was born, and he was put in the way of being brought up as a Catholic. Then a girl was born, and she was baptized in the Protestant Church. The parents were poor, and the father, falling into a consumption, went to live with his own parents, taking the boy with him. The mother also on her side went to her own parents, taking the girl with her. The father of these children died soon afterwards, leaving no money for the support of the wife or children; but by his will he appointed his brother guardian of the children, this brother being a Catholic. The widow had not heard of this will, but the boy continued after the father's death to be supported by the father's relatives, and the father's brother, though himself a Catholic, did not at first interfere with the girl, who was left under the care of the mother and educated by her as a Protestant. In 1871, being eight years after the father's death, the Catholic guardian wished to have the custody and education of the girl, in order that she might be educated as a Catholic. This was resisted by the mother,

and there being a dispute as to the validity of the appointment of the guardian, that point was determined by a judge and jury, who found that the will was valid. The Queen's Bench was then applied to for a writ of *habeas corpus* for the delivery up of the girl. That Court held that the girl must be delivered up, but also intimated that if it had had the powers of the Court of Chancery, it would have declined to deliver up the child. Thereupon the mother applied to the Court of Chancery for an order to restrain the guardian from interfering and removing the child from the mother's care. Malins, V.C., after considering all the facts, came to the conclusion that, though the parents had agreed that the boys should be educated as Catholics and the girls as Protestants, yet that the father had a right to alter that and resort to his legal rights as a father. Yet it was said at the same time that the father, by his conduct during his life, and also the guardian, by his conduct after the father's death, had waived their respective rights by allowing the mother to retain the control over the girl's education, and it was too late to alter that state of things. Hence the Court refused to take the girl out of the mother's custody. That case went to the Court of Appeal, and the Lords Justices also agreed that, though the father's right was absolute, yet that, notwithstanding the agreement before marriage to allow the mother to educate the girl, the father might waive his right, and that both he and the guardian had done so in this case. Hence the girl was left in the custody of the mother.

The Court of Appeal learnedly discussed the rights of parents. Mellish, L.J., said that a father cannot bind himself conclusively by contract to exercise, at all events in a particular way, rights which the law gives him for the benefit of his children and not for his own benefit. Moreover, the Court could not, during the lifetime of a father, compel him out of his own funds to educate a child in a different religion from his own. But the Court would, if the circumstances made it for the benefit of the child to be educated after the religion of either of the parents, not scruple to act for such benefit. Even a father himself may lose the right to the custody of his child by allowing it to be brought up by other persons, if it becomes the manifest interest of the child

not to be removed from the custody in which it has been placed.

In another case, a few years later, of *Re Agar Ellis* (10 Ch. D. 49), the father's rights were again discussed. A Protestant father had married a Catholic mother, and, being of high connections, the question of difference of religion had been raised before the marriage. The lady had at that stage been resolute in favour of her own creed, and the gentleman had, after a long resistance, conceded the point to this extent, that the mother should have the children educated in the Catholic religion. On that basis the marriage took place. Children were born. The father was next said to be trying to revoke or qualify the consent he had given as to the education of the girls. There was a struggle going on for ten years between the parents on this point, and when the children had reached ages between nine and twelve the struggle had ended in the mother setting at defiance the father's authority. The father in turn used his authority to take the girls to the Protestant church, whereupon the mother applied to the Court of Chancery to protect her against this course. The Court of Chancery, as Malins, V.C., represented it, thought it an irksome duty to interfere in such a case; but he observed that the mother had, by her marriage, undertaken the duty of submitting to her husband, and doing all things that he should desire. And though the father had, in his ante-nuptial days, conceded something, still his paternal power was supreme, and there was no instance recorded in which the paternal authority of a father over his children had been interfered with, where the mother was living with him in the same house. Hence the father was allowed to take the children to the Protestant church. And the Court of Appeal entirely agreed with the Vice-Chancellor in that conclusion.

Another case of a similar kind arose in 1888; but meanwhile the Guardianship of Infants Act, 1886, 49 & 50 Vict. c. 27, was passed, by which it was enacted that a mother who survives the father of her children is now by law their guardian, either alone, where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. And as regards her powers as such

guardian, they are to be those which any guardian appointed by will or otherwise had at the passing of the Act under the statute of 12 Ch. II., c. 24. In *Re Scanlan* (40 Ch. D. 200), the deceased father was a Protestant, and the surviving mother was a Roman Catholic. It was proposed that two Protestants should be appointed to act jointly with her as co-guardians of the infant children of the marriage, so that they might be brought up as members of the Church of England. The main contention then was that the Guardianship of Infants Act, 1886, did not take away the primary authority and overruling control of the father. The Court came to the conclusion that the father's power was unaffected by this Act of 1886. Accordingly, although under the Act of 1886 a mother who survives the father of her children is now by law their guardian, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by him, she has no greater powers as regards the religious education of the children than those which any guardian appointed by will or otherwise had at the passing of the Act; and unless under very special circumstances, she is held to be bound to see that the children are brought up in the religious faith of the father, whatever that faith may have been.

The most recent case on this subject is *Re Violet Nevill* (1891, 2 Ch. 299). Before the marriage of a Protestant with a Roman Catholic wife, the parties signed an undertaking that all the children of the marriage should be brought up as Roman Catholics. There was only one child of the marriage, a girl, who, with the father's consent, was baptized as a Roman Catholic. When the child was about three years old, the father, who was in destitution, died at the house of M., a Protestant cousin of the wife, who was in good circumstances, and had been kind to the family. The father on his death-bed had commended his wife and child to M., and appointed no guardian. Soon after his death the child, with the consent of her mother, who was statutory guardian, went to live with, and was maintained by, M., with whom she remained till she was seven years old, and to whom she was greatly attached. The mother then died without appointing a guardian. After her death her brother, who was a Roman

Catholic, insisted that the child should be brought up a Roman Catholic, took her away from M. by force, and sent her to America, whence she was brought back under a writ of *habeas corpus*, obtained by N., a Protestant brother of the father. Nothing had been said to M. by either father or mother as to the religious education of the child. The Court of Appeal held that as the child had no parent or guardian, the Court had only to consider what was for her welfare, having due regard to the wishes of the father as to religious education; that the ante-nuptial agreement was not binding on the father; and that though he acted during his life on the view that the child was to be brought up as a Roman Catholic, he was at liberty to change his mind, and that it would not be inferred that in the events which had happened he would have wished the child to be taken from M. in order that she might be brought up as a Roman Catholic, for the Court thought this would not be for her benefit. The child accordingly was ordered to be delivered up to M. to be educated as a Protestant. The Court observed that there was no one in the present case who had any right to say that the child should be brought up in a particular religion. The child was in the father's lifetime left in the care of the kindest person whom the parents knew, and the Court held that it was not for the child's benefit that she should now be removed from that care. And Kay, L.J., observed that the child had in this case been placed in M.'s care by the parents, and the Court was not obliged to do what was not for the child's benefit, namely, to take her away from a kind friend for the mere purpose of having her brought up in another branch of the Christian religion.

These cases seem to touch on nearly all the situations in which a child can be placed as regards religious education, and show how much is conceded to the father's wishes.—
Justice of the Peace.

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The Reform of the English Circuit System.—The Long Vacation has let loose upon lawyers one great subject of controversy, which may well last them throughout the dull season. The bitter cry of those affected by the muddle of

legal business, both in the metropolis and the country at large, has at last made itself heard. The circuits themselves have raised their voices, the Lord Chief-Justice has been approached upon the subject, and at length the *Times* has admitted a correspondence to its columns, and has devoted a leading article to its elucidation. Yet it is difficult to see that any good can result from the controversy. The Imperial Parliament is too much occupied with great political schemes of local government and land purchase to busy itself with less sensational measures, which at the same time affect to an infinitely greater degree the lives, security, and business of the country at large. As for private members, it would seem that the day of their legislation is over. With Parliament in its present state, it is impossible that any private member should succeed in altering a state of things which is yearly becoming more scandalous, or even in calling attention to the facts of the case. A motion upon the subject in the recent session of Parliament resulted in an immediate "count out." Yet that the present condition of the circuits is rightly described as scandalous, no working lawyer will be found to deny. The only difficulty is to know where to begin. There are two main classes of grievances which are now receiving attention and agitation—those of the metropolis, and those of the counties in general. As regards the metropolis, no common-law practitioner can fail to realise what the present system means. There are fifteen common-law judges in all. During the year there are four circuits. Of these, the spring and the summer circuits are the most important. During the recent summer circuit the judges began to leave town on the 23rd June, and the circuits were finished about the 12th August. During the greater part of that time there were only two common-law judges permanently in London. One of these sat at chambers, as indeed was necessary. It is true that Mr. Justice Vaughan Williams was in town until the 21st July, but during that time he was sitting as an additional Chancery judge for the hearing of actions. The common-law business of London was therefore left to an average of one judge! The same thing occurs in the spring circuit, when the same proportion of judges are absent from about the 30th January until Easter, and the same unit sits in London. In

the winter and autumn circuits, things are slightly better. From about the 30th November until Christmas, some half the number of judges are absent on circuit, criminal business alone, as a rule, being taken at these—the autumn and winter circuits. It comes to this, therefore, that the common-law bench in the metropolis is fully manned for less than half the working days of the legal year. What is the result? Diminishing business, when business can be done at all, and almost complete stagnation of business when the circuits are in full swing. The result, as every lawyer knows, is that business is leaving the common-law courts. City men, who cannot brook the law's delay, resort to outside arbitration; solicitors transfer their causes to the County Courts if their clients desire a rapid decision, or into Chancery, where the same result is achieved with greater costs; whilst anomalous jurisdictions like the Mayor's Court are full to the eyes with business. London, the fountain of English justice, stagnates and decays. Nor is this all. Such results could be endured if the country at large gained thereby; but the reverse is the case. We have the leader of the Midland circuit complaining of the lightness of civil business—185 actions being tried in the year, and the average annual amount recovered being some £10,000. On that circuit the system of sending single judges to assize towns for both civil and criminal business results in delays so great that justice cannot be done, and litigants are leaving the courts. On the Western circuit it is complained that the actions brought to trial are petty and trumpety in character, being, as a rule, conducted by junior barristers alone, without leaders. Out of the whole nine circuits, the Northern and the North-Eastern alone seem to be flourishing so far as civil business is concerned, the associate of the latter declaring that its causes are, as a rule, more important than those tried in London. Yet, taking the circuits as a whole, the extraordinary fact appears that the average annual amount recovered in civil actions before them all is some £100,000. As the *Times* points out, this is practically equivalent to the business done by a single Chancery judge in the course of the legal year. It comes to this, then, that on the majority of the circuits the civil causes tried are such as might almost

invariably be disposed of in the County Court, and even with that qualification they are not decided either with expedition or certainty under the existing system. We see, then, that the present system is fatal to London business, and by no means a success throughout the counties. We see, further, that both propositions become more clearly true with every year that passes. As these facts are gradually becoming more and more patent to the profession, it is only to be expected that we should be inundated with suggestions for reform. In a paper of this scope it is impossible to do more than sketch very briefly the substance of the various proposals made. (1) The first main suggestion is to abolish the assizes for civil business. It is proposed that the existing County Court judges should become district judges of the High Court. All causes arising within their districts should be heard by each from start to finish, including all interlocutory proceedings. There should be power retained to remove cases to London for trial. But in all ordinary cases the district judges should determine the whole matter in dispute. The Court should sit continuously all the year round. To remove any chance of local bias or prejudice, the circuit of each judge should be changed every three years. The mere "debt collecting" part of the present County Court business should be assigned to the registrars. And the salaries of these judges should be raised to £2500 a-year. (2) In connection with the above proposal, it is also held that the vast bulk of criminal causes should be tried before local recorders, as is now the case at the Central Criminal Court. This proposal is an extension of the Assizes Relief Act of 1890, which endeavours to provide that Quarter Sessions cases shall be tried at Quarter Sessions. Only the graver criminal cases should be tried before the High Court judges on circuit. By this means it is thought that the problem of instituting a Court of Criminal Appeal to be held in London might incidentally be solved. (3) It is suggested that a remedy might be found in a greater concentration of business. This scheme seems to have met with the approval of Mr. Justice Hawkins. By this proposal the assizes should in future be held only at certain great centres. The main objection to this proposal is the amount of local jealousy which it would create. Such towns as Oakham and

Appleby would object to being deprived of their rights as assize towns, which no doubt bring a certain amount of business and money into them. (4) An alternative proposal is to abolish trials at *Nisi Prius* altogether, and to try all civil cases in London. To say nothing of local inconvenience, it may be pointed out that London and Middlesex could hardly supply the number of jurors that would be required under this scheme. (5) Another proposal is to reduce the number of circuits to three, which should be held in February, July, and October, the last being for criminal business only. The effect of this change would be infinitesimal. (6) Lastly, it is proposed that the Queen's Bench Division should have continual sittings in London without vacation. The judges should go on circuit, and take vacations in turn. But Courts should always be sitting in London, and six judges should be continuously travelling on circuit. It is hoped that by this means business would be enticed back to the courts in London. All these proposals are now more or less tentatively before the public. There is ample time and opportunity for their discussion. But it is obvious that it will require a very great movement indeed, or a very great man, to succeed with this gigantic and much-needed reform. The hope has been expressed that the President of the Incorporated Law Society will express the feelings of his branch of the profession at the annual meeting, which is to be held at Plymouth towards the end of this month. No one can doubt the necessity for reform. The question is simply whether the modern desire for efficiency is to be sacrificed to what one writer has called "an interesting, but antiquated survival of our ancient legal system."—*Law Times*.

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The Solicitor.—Strictly speaking, the solicitor is not a middleman; but a large section of the public regard him as such, and to them we would say a word on behalf of one whose thankless task it often is to rescue his clients from the difficulties and disasters in which misfortune, incapacity, or obstinacy has involved them.

If people desire to do without lawyers, let them cease to provide occasion for litigation. This would at once doom

part, at any rate, of the legal race to extinction. It is simply a question of cause and effect. If people did not quarrel and misunderstand and malign each other, a large portion of a lawyer's occupation would be gone. If people never mismanaged their private or business affairs, there would be still less need for professional assistance. Humanity, however, shows itself in no undue haste to arrive at such sublime heights of magnanimity and wisdom; and having need of servants it would be better if they used them well, instead of abusing them, always remembering that "a friend in need is a friend indeed."

The lawyer, whether barrister or solicitor, does stand midway between the bench and the suitor, not in order to obstruct the flow of justice, but to facilitate its passage. That is, in fact, the theoretical position of the lawyer in this country. The solicitor, just like the judge and barrister, is a part of our system of judicature. The judge decides and orders, but he does so upon material furnished by the solicitor, and placed before him by the barrister. It is, both in theory and in fact, the duty of a solicitor to assist the judge in arriving at a just conclusion. We say in fact, because a solicitor stands in immediate danger of punishment and disgrace who is animated or acts with an opposite desire—that is, a desire to defeat the ends of justice. It was only recently that one of Her Majesty's judges, in striking a solicitor who had proved false to his client off the Rolls, insisted that the enormity of such offences was greater from being committed by men who were sworn members of a system which had for its object the suppression of wrong and distribution of right.

A man once wrote a book called *Every Man his own Lawyer*, and a very good book it is; but if it was written in the interests of clients, the author ignored the truth of the proverb that "the man who is his own lawyer has a fool for a client." Not only is this so in the case of ordinary individuals, but of lawyers themselves. The cases on record of eminent legal lights who came to grief when acting on their own behalf are not rare. The fact seems to be that no individual, in spite of the Socratic injunction, can "know himself" with exactitude. His claims he will either

exaggerate above or abate below their true value, according to the manner of man he is. To arrive at a just estimate of his position, a man must consult another. But who shall the other be? If he goes to a friend, that friend will naturally be anxious to agree with his own view of the case, and it would often be as dangerous to act on the advice of a friend as on that of an enemy. Neither the friend nor the enemy will be predisposed to regard the matter in a clear, dry light, free from distortions, for the simple reason that they stand in those relationships. What, therefore, is the poor man to do. Well it is just at this point that the value of a solicitor's help may be appreciated. If he is consulted, he will indeed be desirous to look favourably on his client's case; but he will not encourage the client's prejudices, or estimate at less than their proper value the arguments of the other side. There will be many instances in which the solicitor will decline to prophesy the decision of the judge or jury. He may see his client's case to be stronger or weaker than the client himself may have imagined, but whatever the case may be, it will be that, and not a creation of the imagination, that he will strive to maintain.

We have described *Every Man his own Lawyer* as an excellent book. It is—in the interests of the lawyers. By all means let people cultivate the knowledge of how to avoid entanglements, but in the name of common sense let them not practise law in their own interests. They are without experience, which is a want fatal to success. This experience the solicitor has, and it is worth paying for.

Here we come to the subject upon which solicitors have ever been denounced and held up to execration—that of costs. It sticks in a man's throat that he should have to pay his solicitors three shillings and sixpence for writing a letter which he will tell you he would do himself for threepence-half-penny, or to pay six-and-eightpence for an interview, which he himself is always willing to accord to others gratis. Well, all we can say is, that this is just about what letters from and interviews with some people are worth. They are not directed to achieve anything, and do not achieve anything. On the other hand, a solicitor's letters and interviews have a definite

purpose and result—they are the outcome of knowledge and experience gained at much cost. It is for the assistance of his solicitor's knowledge that a man pays, and the solicitor is under the unfortunate necessity of having to charge for the help he renders in small items, instead of in a lump sum, except where conveyancing work is concerned. These multifarious small charges furnish actual evidence of work done. There is no unearned increment here, neither is there a speedily-earned increment. By stages, laborious and slow, does a solicitor earn his remuneration. He is precluded from lucky hits, while the client who grumbles at his charges may go out and make a hundred or a thousand pounds over a single transaction which involved little or no mental or physical power. We do not imply any reproach in this, we simply state the fact, that whereas business men can, and often do, speedily and with little exertion amass large wealth, a solicitor is precluded from doing anything of the kind. The most prosperous solicitor is he who has done the hardest work and shown the greatest skill, and even such as he rarely acquire a fortune which in these days would occasion surprise or remark.

Another reason for this is to be found in the fact that a solicitor's business is liable in a great degree to bad debts. It must be so in the very nature of things. A considerable proportion of every solicitor's clients are people in difficulties, prospective bankrupts, to whom the issue of certain proceedings may mean financial disaster. It is to the honour of the profession that they do not desert clients so circumstanced. Their loyalty to the man who places his affairs in their hands is as curious as surprising; but solicitors seldom get credit for this, although it often costs them dearly. This loyalty too frequently shows itself in more tangible form than the running of risks. There are plenty of men to-day who owe their solvency solely to the timely monetary aid which their solicitor afforded them at critical moments, not at usurious interest, nor with ulterior motives, but simply and solely because they were his clients.

We do not believe a solicitor to be overpaid for the work he does, or the service he renders. Sometimes, indeed, the fee is absurdly small, compared with the value of the service;

as in the case where the advice of a solicitor, for which perhaps he charges a guinea, saves a person from taking a step which would have had disastrous consequences. Then, again, it is open in many cases for a man to enter into an agreement as to costs with his legal adviser. Take one single example, that of the collection by legal process of accounts owing to a business firm. There are plenty of solicitors who, for a modest yearly retaining fee, will take the necessary proceedings for recovery without charging their clients any costs above and beyond disbursements in unsuccessful cases, contenting themselves with such costs as may be recovered from the debtors. This is the most economical arrangement that a business firm can adopt; for if any question of law arises, the solicitor is capable of dealing with it. Firms who employ a clerk at a good salary to do their County Court work in preference to a solicitor, forget this latter point, and so lose by it. The clerk may be all very well so long as no legal question arises, but when this happens, a solicitor has to be called in and full costs paid him.

We have many times heard people grumble at the legal costs and deeds incidental to the transfer of property. They urge that land and houses should be as freely transferred from one possession to another as the grocer passes a pound of sugar over the counter in exchange for his customer's money. The best answer to such a proposition would be to give it a trial, and see the result in a few years' time. The purchaser of a pound of sugar can take it away with him and consume it; there is no fear of doubts arising as to his rights of possession; but he who buys land or houses can neither take them away from where they are nor consume them. He cannot be always in occupation of them; hence the necessity of those parchments which he affects to scorn, but which secure to him his rights, though he be a thousand miles away from their location.

It is, of course, open to a man to buy property without legal interference or parchment records, but he is a fool for his pains if he does. In the first place, he would rarely be clear as to the delimitations of what he was buying; and, in the second, we suppose he would take it on trust as to whether

the vendor had any right to dispose of the property for which he was paying. The duty of the solicitor in such a matter is to see that the client is getting what he bargained for; and, further, to make absolutely certain, before money passes, that what the vendor would fain dispose of is his to sell.

Space forbids our entering into a detailed defence of the solicitor. It would be a pleasing but gigantic task, for now-a-days the calls upon him are most varied and onerous. A morning spent in the room of a busy London solicitor would slightly surprise some of his critics. His callers will possibly, and probably, comprise a gentleman who wants to give instructions for a will which is to provide for contingencies which may happen in the third or fourth generation. He is followed in quick succession by a party of gentlemen seeking legal assistance in the promotion of a company, and, as the usual corollary, a subscription for shares from the solicitor. These disposed of, attention has to be turned to those who have a fighting action on hand, or a divorce, or the purchase and sale of property, or the raising of a loan, the staving off of creditors, the liquidation of an estate, the proving or disputing of a will. In addition, company directors will call to be instructed how to conduct the business of their company. Shipowners will request advice on some of those awful questions which come under Admiralty law. Clients with money to invest will want to know how and where to invest it, others to realise their investments, or to ask the unfortunate solicitor to advance the interest before it is due. It will be observed what a power of concentration is here required from the man of law. To all these callers he has had to give a fresh attention, and turn his mind into an entirely different train of thought. In no two instances would the same special knowledge suffice, but common sense would never have to be absent, be the case what it might. A solicitor could not carry on his business without this latter commodity, he is so often called upon to dispense it in favour of those who seek his counsel.

Were it not for that venerable institution, the Long Vacation, our asylums would speedily be pressed for room in accommodating legal lunatics. A solicitor could not continue, year in, year out, dealing with excitable, over-anxious,

abusive, cantankerous, and stupid clients, or with irritating officials, and perform work ever requiring great mental effort, without going clean, stark, staring mad. At the same time, it must be understood that all the work of a solicitor's office does not stand still during the "Long" by any manner of means. There are some solicitors whose class of practice it affects but slightly, so these gentlemen have to ordain a vacation for their own special benefit.

The public are well protected from suffering at the hands of the solicitor. Various batteries always cover him, ready to open fire if he offends. If negligent or incapable, he can be mulcted in damages by the client. He may not make arbitrary charges for his services, for his costs must not exceed the allowances of a rigid scale, and are always subject to taxation by an obdurate taxing-master. Above all, there is a lynx-eyed Incorporated Law Society, ever watchful to note any offence against honesty or breach of trust. With relentless purpose the Society will institute an inquiry, and if he has committed wrong, the solicitor will find himself struck off the rolls, and go forth into the world ruined and disgraced, without hope of restoration.

Happily it is not needful to dwell on the blacker side, for deviations from the path of fair dealing by solicitors are just sufficient to prove the reverse to be the rule. Moreover, as the witty author of *The Comic Blackstone* remarks, "The race of roguish lawyers would soon be extinct if roguish clients did not raise a demand for them. No man need have a knave for his attorney unless he chooses; and, when he goes by preference to a roguish lawyer, it must be presumed that he has his reasons for not trusting his affairs to an honest one."

But in these days the solicitor is at once the confessor and adviser of the community. His office is the nineteenth-century confessional box, and while he holds the key of the cupboard in which is the skeleton of the private family, or business firm, it is turned to none. Peers and politicians, the business man and the landed proprietor, the cottager and the mechanic, tell him their story without reservation, and know it is in safe keeping; and to-day it is to the office of the much-abused solicitor that men turn, feeling that there,

rather than elsewhere, they can depend upon finding a guide, philosopher, and friend.—*Mercantile Guardian*.



A Match for Counsel.—In a right-of-way case which recently came before Mr. Justice Kekewich, a local surveyor entertained the Court with a brilliant resistance to the sallies of a well-known Chancery barrister who sometimes attempts to confuse witnesses by filling them with awe at their solemn surroundings. "Remember that you are upon your oath," he was told. "I am not likely to forget it, I think, while I see you in front of me," was the surveyor's very unexpected reply. The learned gentlemen tried another question: "Would you continue to state what you have told us if another witness possessing the same opportunities as yourself said the opposite?" Without the least hesitation came the answer: "If another witness possessing the same opportunities as myself were to make a statement contrary to my own, I should know that one of us was wrong." And the local surveyor proudly surveyed the court as his cross-examiner, somewhat crestfallen, set his wig right, and resumed his seat.—*Irish Law Times*.



A Hard Case.—One of the bitterest pills that a legal draftsman has to swallow is to see a slip on his part quite destroy an intended gift by deed or will. It seems hard, too, on an intended recipient that he cannot bring forward parol evidence, which would be possibly so cogent as to secure him the gift, on the ground of the non-admissibility of such evidence. In *Re Ely, Tottenham v. Ely*, the late Lord Ely bequeathed £2000 to his cousin Adam R. C. Loftus, son of his late uncle, the Rev. Lord Adam R. C. Loftus, unless he should immediately on the testator's death succeed to the title of Marquis of Ely. The name, "Adam R. C. Loftus," was a mistake of the draftsman for that of "Lord G. H. Loftus." Parol evidence is allowed to explain latent ambiguities, but here the ambiguity was patent—that is, on the face of the will—as the gift was to a non-existent person, and Mr. Justice Kekewich refused to permit parol

evidence to be adduced. This is certainly hard, and we cannot help feeling that as the will gave him another designation besides his name, viz. "son of my late uncle," and as he was both at the date of the will and the death of the testator the only surviving child of that uncle, some attempt might have been made to obtain the legacy for him on the ground that the rest of the description of him was a *falsa demonstratio*. Still we must admit that this would be dangerous, as a testator might intend the gift for a person whose death he had not heard of, and not for the person who best answered the description at the time of the execution of the will and the testator's death. Solicitors should always insist on their clients reading their wills carefully through, and seeing that the names of the legatees are correct.—*Law Times*.

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Counsel: "Did you observe anything particular about the prisoner?"

Witness: "Yes; his whiskers."

Counsel: "And what was there peculiar about his whiskers?"

Witness: "Why, he had none."—*Green Bag*.

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Counsel: "Now, Mr. Jenks, you say Mr. Joseph Jenks is a distant relative of yours?"

"Yes."

"What relation is he?"

"My brother."

"But you just said he was a distant relative."

"So he is; at present he is residing in India."—*Green Bag*.

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Advertising in German Paper.—An interesting decision has just been given by Chancellor M'Gill, of New Jersey. Recently ex-Judge Blair, as a special master, made a sale of some property. The Chancellor has refused to confirm the sale because ex-Judge Blair advertised it in a German newspaper. The Legislature of New Jersey last winter passed a law making it mandatory in all judicial land sales

to publish an advertisement in one German newspaper. Under this law ex-Judge Blair inserted an advertisement in one English paper and one German paper. The Chancellor decided that the law had not been complied with; that the advertisement in the German paper should have been printed in English. He quotes from 4 & 5 Geo. II., which provides that all judicial proceedings after 1733 shall be published in the English language. Prior to that date they were published in Latin. The Chancellor ordered another sale, and it will be advertised in accordance with this decision.—*N.Y. Law Journal*.



Evidence.—It is the humour of many persons not members of the legal profession to avow contempt for the laws of evidence as administered in a court of law. For instance, in the immortal trial of *Bardell v. Pickwick*, when Sam Weller added to his answer to the counsel's question the words "as the soldier said ven they ordered him three hundred and fifty lashes," the judge interposed, "You must not tell us what the soldier or any other man said; it's not evidence." This, according to Judge Pitt-Taylor in his *Law of Evidence* (7th edit. p. 487, n.), is an amusing caricature of "the rule excluding hearsay evidence, or rather the mode in which that rule is frequently misunderstood in courts of justice." Many, possibly even in the legal world, think that the rules are merely arbitrary and not founded upon the nature of things. It is refreshing, then, to come across the recognition of the correctness of the legal rules by so great a scholar and writer as Dr. Abbott, late headmaster of the City of London School, in his recent work *Philomythus*. On p. 86 he says: "What is 'legal proof'? It is simply proof of the ordinary kind, by evidence direct and indirect, but stronger and stricter. Legal proof being seldom required except where facts are affirmed and denied by interested parties, requires (in a greater degree than ordinary proof) that the evidence shall be deliberate, hence the use of the oath; free from exaggeration or misunderstanding, hence the rejection of hearsay evidence; consistent and truthful, hence the demand that every witness shall undergo cross-examination; free from suspicion, hence

the preference of evidence as to character (and even of evidence as to facts) coming from witnesses who have no interest, one way or the other, in the ultimate decision. Occasionally, in the excessive desire to serve order, law has unfairly favoured despotism, and in the excessive desire to be fair to the accused it has foolishly excluded evidence that might have fairly helped the accused. But, on the whole, it may be said that legal proof is of the same kind as ordinary proof, only superior in degree." That is a noble eulogy, and Dr. Abbott should be told that at least some part of the evidence which he deems to have been foolishly excluded will shortly be admitted on behalf of the accused.—*Law Journal*.

Reviews.

A Handbook of Bankers' Law. By the late HENRY ROBERTSON, N.P. Fifth Edition. Revised by BREMNER PATRICK LEE, M.A., Advocate. Edinburgh: Bell & Bradfute. 1891.

ORIGINALLY published in 1862, Mr. Robertson's work has now reached a fifth edition. Within the ten years which have elapsed since the appearance of the fourth edition, statutes of importance have materially affected Bankers' Law in Scotland, and Mr. Lee has embodied the changes in the book before us. The chapter on "Bills" has been entirely re-written—in great part by Mr. J. D. Sym, advocate. "The Memorandum on Banking in Scotland," by Mr. J. S. Fleming of the Royal Bank, has also been revised by its author. The work is well known; it is widely used and appreciated; consequently, we need only express the opinion that Mr. Lee has done his editorial work well, and that the usefulness of the handbook has been greatly increased by his successful effort to bring it down to date.

English Decisions.

JULY—AUGUST.

(All current English decisions likely to throw light upon any point of Scottish law or practice are here reported.)

BAILMENT.—*Bailee for hire—Negligence of servant of the bailee—Servant acting against express orders of the master—Liability of the bailee.*—The plaintiff let out a horse and carriage to the defendant by the year. Defendant's own coachman drove defendant to his house, and should afterwards have taken the horse and carriage direct to the stables. Instead of doing so in the ordinary course of his duties, he deviated and went another direction, and while so doing, and by negligently driving the horse, it became injured. The plaintiff brought an action on the contract against the hirer for the damage done to the horse. The County Court judge held that the hirer was not responsible, on the authority of *Storey v. Ashton* (L. R. 4 Q. B. 476), in which it was held that under somewhat similar circumstances the master was not liable to a person who been run over and injured by the servant, on the ground that he was not acting in the course of his employment. *Held* (by Mr. Justice Cave and Mr. Justice Charles), that the defendant (the hirer) was liable, and appeal allowed, with leave to appeal.—*The Coupé Company v. Maddick*, High Ct., Q. B. Div., 4 July.

COMPANY.—*Alteration of Memorandum of Association—Confirmation by Court upon condition of alteration of name of company—Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), sec. 1.*—This was a petition by the Oriental Telephone Company, under the Companies (Memorandum of Association) Act, 1890, for the confirmation by the Court of a special resolution for the alteration of its memorandum of association so as to enable it to supply electricity and manufacture electrical appliances for purposes other than telephonic communication. *Held* (by Mr. Justice Romer), that, if the proposed alterations were made, the name of the company would be misleading; and, following the decision in the case of *Re Foreign and Colonial Government Trust Company*, (L. R., 2 Ch. 395), that the petition must stand over to enable the company to alter its name so as to make it consistent with the proposed change, and must be mentioned again when that had been done. The order would not go until the alteration had been made.—*Re Oriental Telephone Company*, High Ct., Ch. Div., 25 July.

COMPANY.—*Alteration of Memorandum of Association—Confirmation by Court upon condition—Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), sec. 1.*—This was a petition under the Companies (Memorandum of Association) Act, 1890, by the

Indian Mechanical Gold Extracting Company, the operations of which were, by the terms of its memorandum of association, confined to India, for the confirmation by the Court of a special resolution for the alteration of its memorandum of association, so as to enlarge the local area of its operations to any part of the world. The Act provides, sec. 1 (3), that "an order, confirming any such alteration, may be made on such terms and subject to such conditions as to the Court seems fit." *Held* (by Mr. Justice Romer), that, if the alterations were made, the existing name of the company would be misleading; and, following the decision of Stirling, J., in the case of *Re Foreign and Colonial Government Trust Company* (2 Ch. 395), that the petition must stand over in order that the company might alter its name, either by striking out the word "Indian," or by adding the words "and General" after the word "Indian," and must be mentioned again after that had been done. The order would not go until the alteration had been made.—*Re Indian Mechanical Gold Extracting Company*, High Ct., Ch. Div., 25 July.

ILLEGITIMATE CHILD.—*Rights of mother*.—The mother of an illegitimate child, more than seven years old, has, on the question of nurture and education, the same rights over it as the father of a legitimate child has over his child, and the Court is bound to give effect to her wishes unless it should be of opinion that she is unfit to have the control of it. Judgment of the Court of Appeal affirmed.—*Barnardo v. M'Hugh*, H. of L., 30 July.

BILL OF EXCHANGE.—*Negotiable instrument—Qualified acceptance*.—A bill of exchange was drawn by F. payable "to order F." The appellants, on whom the bill was drawn, struck out the word "order" and accepted the bill "in favour of F. only, payable at the Alliance Bank, Lincoln." In an action by endorsees for value against the acceptors: *Held*, that the acceptance did not vary the effect of the bill as drawn, and that it was a general acceptance of a negotiable bill, and therefore the action could be maintained. Judgment of the Court of Appeal (25 Q. B. Div. 343) affirmed, Lords Bramwell and Morris dissenting.—*Meyer & Co. v. Decirix Verley & Co.*, H. of L., 30 July.

CONTRACT.—*Implied condition—Contract to supply articles for ten years—Implied condition that party will not dispose of business during that time*.—The plaintiffs traded as the Brewers' Grains Company, and the defendants were the owners of a large brewery in Westminster, and by the contract, which was dated the 14th July 1885, the defendants agreed to sell and the plaintiffs to buy all the grains made by the defendants at the current rate charged each year by certain specified firms of brewers from the 10th July 1885 until the 30th September 1895, the quantity of grains to be calculated monthly and payment for the same to be made at the brewery on or before the last day in the month following delivery. There were other terms in the contract not now material. This

contract was duly performed on both sides until August 1890, when the defendants sold the brewery. The defendants having sold the brewery ceased to supply grains to the plaintiffs, and the plaintiffs then brought this action against the defendants for their estimated profits until the month of September 1895, the date when the contract was to end. The contract was to supply the grains for ten years, and the plaintiffs contended that this contract implied that the defendants would not wilfully do anything to put it out of their power to fulfil the contract; in other words, that there was an implied term in the contract that the defendants would not sell the business for the ten years, and so make it impossible for them to complete the contract. The defendants, on the other hand, contended that there was no such implied condition, and that all that the contract meant was, that they were to supply the grains to the plaintiffs for the ten years if they so long retained the brewery. The sole question now was, whether there was an implied condition in law that the defendants would not wilfully do any act, such as selling the business, which would make it impossible for them to continue to carry out the contract. Many cases having been cited on each side as to the existence of this implied condition in law: *Held* (by the Master of the Rolls and Lords Justices Bowen and Kay), that each contract must be decided by itself as to whether the law implied any condition that the parties would do nothing to cease carrying on the business; that no such stipulation ought to be inferred unless it was such that it was clearly and necessarily within the contemplation of both parties, and as that was not so in this case judgment ought to be for the defendants. Appeal allowed.—*Hamlyn & Co. v. Wood & Co.*, High Ct., Ct. of App., 30 July.

TRADE MARK.—*Alteration of register—Removal of words "Trade Mark"*—*Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), sec. 92.—A manufacturer of soap registered in November 1878 two marks for soap as old marks under the Trade Marks Act, 1875. One, No. 15,792, consisted of a label within a square. On the upper part were printed in thick type of an ordinary character the words "Boaler's Soap," the words being arranged in two lines. Under the word "soap" two straight lines were printed running nearly but not quite across the square, so as apparently to disconnect the upper portion of the label from the lower. The lower part consisted of the words "trade mark" printed immediately over a device consisting of printed lines, some arranged diagonally and others vertically and horizontally. In February 1876 he had registered a part only of this trade mark as an old mark, being No. 2641, and for the same class of goods. This mark consisted identically of the lower part only of the mark No. 15,792, namely, the words "trade mark" with the device underneath. Upon his application to register No. 15,792, he described the trade mark as consisting of the words "Boaler's Soap" printed wholly in black

ink in prominent letters and the words "trade mark," and below the latter there was a device, which he then proceeded to describe. He applied, under section 92 of the Patents, Designs, and Trade Marks Act, 1883, for leave to alter the mark No. 15,792 by striking out the words "trade mark" in consequence of the observations of Lord Justice Fry in *Re Apollinaris Company's Trade Marks* (2 Ch. 233). In his affidavit in support of the application he stated that his user of the mark No. 15,792 before 13th August 1875, was of the whole mark as it stood on the register, including the words "trade mark;" that the words "trade mark" were not placed upon the mark for the purpose of indicating that any special part thereof was registered as a trade mark, or that any other part was open for any one else to copy; and that the word "Boaler" was a word which might be used by any person in the soap trade. *Held* (by Mr. Justice Chitty), that leave to alter the mark ought not to be given—first, because the mark, being claimed as an old mark, ought to be registered just as it was used, and to strike out the words "trade mark" would, in the circumstances of the case, be to allow an alteration which, though it might be of a non-essential particular, would be a material alteration; secondly, because in the old mark as it had stood on the register for upwards of twelve years, there was an indication of an intention to claim only the device as the trade mark, and the public, and particularly the traders in soap, were entitled to have the same indication of a restrictive claim, and consequently the same protection, retained on the register; and thirdly, because to allow the words "trade mark" to be struck out with a disclaimer of the words "Boaler's Soap" (as was suggested on behalf of the applicant) would be for most purposes futile, for the effect would be, on a question of right, to reduce this trade mark to the same thing identically as the trade mark No. 2641, while it would afford the applicant the opportunity of practically using the whole of the mark No. 15,792 less the omitted words, without the necessity of stating the disclaimer, which would be on the register only.—*Re Phillips' Trade Mark*, High Ct., Ch. Div., 31 July.

ANNUITY.—*Payment of amount of annuity to the annuitant—Basis on which amount to be calculated—Rate of interest—National Debt (Supplemental) Act, 1888 (51 & 52 Vict. c. 15), sec. 1.*—A testator bequeathed a perpetual annuity of £800 to the children of his daughter, and charged the whole of his real and personal estate with the payment of the annuity. The annuitants, who were all living, and had attained twenty-one, were desirous of receiving the value of the annuity in cash. The National Debt (Supplemental) Act, 1888, sec. 1, provides that "References in the Government Annuities Act, 1829, to bank annuities, or to any class of bank annuities, bearing interest at the rate of 3 per cent. per annum, shall, with respect to any annuities for lives or for terms of years granted under that Act, after the passing of this Act, be construed

as references to bank annuities bearing interest at the rate of $2\frac{1}{2}$ per cent. per annum." It was contended on behalf of the residuary legatees that until the year 1903 interest at $2\frac{3}{4}$ per cent. could be obtained, and that the annuitants ought to give credit for one-quarter per cent. until that date. *Held* (by Mr. Justice Kekewich), that the rate of interest which the Commissioners for the reduction of the National Debt were bound to adopt in granting terminable Government annuities ought to be also adopted in estimating the value of a perpetual annuity; therefore, that the amount of cash to be paid to the redeemed annuitants must be such a sum as at the price of the day would purchase $2\frac{1}{2}$ per cent. stock sufficient to produce the annuity; also, that, as no actual purchase would be made, charge for brokerage should be excluded.—*Hicks v. Ross*, High Ct., Ch. Div., 1 August.

COPYRIGHT.—*Licence—Subsequent assignment of copyright—Infringement—Copyright Act, 1862, secs. 3, 6.*—On the 9th April 1890, A., the owner of the copyright in a picture, sent a photograph of it with a letter to the defendant, suggesting that he should publish it in a paper of which he was the proprietor. On the 1st May 1890 A. assigned the copyright to K., who on the 20th May duly registered himself in the Copyright Register at Stationers' Hall as the proprietor of the copyright. K. (who had no notice of A.'s letter to the defendant) arranged to sell the copyright in the picture to the plaintiff company, and to print the picture for them in colours for a Christmas number of a journal issued by the plaintiff company. The terms were contained in a letter of the 19th April 1890, sent by K. to the plaintiff company, by which he undertook to print a certain number of copies at a price mentioned, which included the "sole and entire copyright," the picture itself and frame to become the property of the plaintiff company at a certain price. The coloured prints were to be delivered in certain numbers at fixed periods, and to be paid for by bills at "five, six, and seven months from date of delivery of goods." The plaintiff company were not registered as the owners in place of K. On the 9th August the defendant published his paper containing an engraving of A.'s picture. The plaintiff company and K. thereupon brought the present action for infringement of the copyright. *Held* (by Lords Justices Lindley, Fry, and Lopes, reversing Mr. Justice Williams), that the letter of 9th April 1890 was not a licence to the defendant to publish the print without any further consent from A.; also (Lindley dissenting), that, on the true construction of the letter of the 19th April 1890, the copyright passed with the picture, and the plaintiff company were the owners of it, and not being registered as such could not sue, and the action must be dismissed.—*London Printing and Publishing Alliance Limited v. Cox*, High Ct., Ct. of App., 3 August.

BANKRUPTCY.—*Motion to commit Member of Parliament—Privilege—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), secs. 27, 117, 118.*—An

application was made to commit A. B., a member of Parliament, for alleged contempt in having refused to be examined on oath pursuant to a summons issued by the Court, and an order made thereon by Mr. Registrar Giffard, on the 13th June. The summons was under sec. 27 of the Bankruptcy Act, 1883, and had been issued pursuant to the order and request of the sheriff-substitute for Roxburgh, made in a Scotch bankruptcy in accordance with the provision of secs. 117, 118 of the Act of 1883; a sealed copy of the summons was served on A. B., and he did not attend on the day fixed for the examination, but obtained an order for adjournment on account of ill-health to the 13th June 1891; on the 13th June he attended, but, acting under the advice of counsel, declined to be sworn, though the registrar had ordered the examination to proceed. The motion was then made to the Court by the trustee to commit A. B. to prison for alleged contempt of Court. On behalf of A. B., a number of objections were raised to the form of the proceeding, but in an affidavit A. B. stated his willingness to submit to examination if the objections were overruled; it was also on his behalf submitted that the order of committal could not be made against him by reason of privilege of Parliament. The Court overruled the objections to the form of the order, and A. B. agreed to abide by what he had stated in his affidavit. The Court also held, that the application to commit must be dismissed, on the ground that the respondent was privileged from arrest as a member of Parliament.—*Re Armstrong*, High Ct., Q. B. Div. in Bank., 7 August.

ENGLISH BILL OF EXCHANGE.—*Indorsement in foreign country—Judgment—Execution—Rights of holders of bill—Bills of Exchange Act, 1882.*—The rights of transferor and transferee on a transfer of a document of title to a debt, or an interest in personal property, are governed by the law of the country where the transfer takes place, and bills of exchange are no exception to that rule. An English bill of exchange was indorsed by A. to the order of B., who indorsed it in blank, and handed it over for value, in Norway, to the agent of an English firm of shipowners. While there it was seized in respect of a judgment debt, and, after a judicial proceeding, was declared to be the property of the judgment creditor. The bill was then sold; it was overdue at the time, but, according to Norwegian law, the purchaser took it free from all equities, although by English law he would only get such title as his vendor had. By a subsequent sale in Sweden, the bill came into the hands of bankers at Gothenburg, and was sent for collection to bankers in England, who realised and paid the proceeds into court. *Held* (by Mr. Justice Romer), that Norwegian law and not English law was applicable, and that the Gothenburg bankers were entitled to the proceeds of the bill.—*Alcock v. Smith*, High Ct., Ch. Div., 8 August.

Sheriff Court Reports.

SHERIFF COURT OF CAITHNESS AT WICK.

Agricultural Holdings Act, 1889—Referee.—Sheriff Thoms, on 18th August, gave judgment in the action at the instance of Mr. Robert Brown, lately tenant of Upper Downreay, against Sir R. C. Sinclair, Bart., for appointment of a referee under the Agricultural Holdings Act to deal with his claim under the Act for improvements at his outgoing from Upper Downreay. Mr. Brown's application to the Sheriff was made on 27th July, when an order was granted by the Sheriff-Substitute on Sir Robert to lodge answers within three days after service. Service was made on 6th August, and answers were accordingly lodged on 10th August. By an Act passed in 1889 amending the Agricultural Holdings Act of 1883, the Sheriff must make the appointment of referee within fourteen days from the date of the application to him. As these days had been allowed to expire before the case came before the Sheriff, he held that he had no power under the Act to make the appointment of a referee, and therefore dismissed the application with expenses against Mr. Brown. His lordship's interlocutor was as follows:—

“Wick, 18th August 1891.—The Sheriff, in respect that no appointment of a single referee can in the present proceedings be made within fourteen days of the presentation of the application, dismisses the petition with expenses in favour of the respondent as these may be taxed, and decerns.
GEO. H. THOMS.”

“Note.—The petitioner's procurator submitted no argument or quoted any authorities bearing by analogy or otherwise on the point raised under the Act by respondent. He did not even crave an adjournment for the purpose of enabling him to do so. It will be observed that, although the petitioner got warrant of service on 28th July 1891, he did not execute it until 6th August. Under the warrant the answers were to be lodged within four days after service, by which time the fourteen days from the date of application had expired.
G. H. T.”

Act. Brims & Mackay—Alt. Keith & Murray.

All communications for the Editor to be addressed to the care of the Publishers, MESSRS. T & T. CLARK 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.



Editorial.

Legal Patronage in England.—Recently we commented on the abnormal amount of legal patronage which the present Government have had to bestow in Scotland. The following list will show that the amount falling to their share in England has been proportionally great. Since they came to office, they have appointed:—Three Lords of Appeal in Ordinary (Lord Macnaghten, Lord Morris, and Lord Hannen); two Lords Justices of Appeal (Lord Justice Lopes and Lord Justice Kay); three Judges, Chancery Division (Justices Stirling, Kekewich, and Romer); six Judges, Queen's Bench Division (Justices Grantham, Charles, Williams, Lawrance, Wright, and Collins); and two Judges, Probate Division (the President and Mr. Justice Jeune). Besides this, they have appointed nineteen County Court Judges, seventy-one Queen's Counsel, thirteen Metropolitan Magistrates, two Masters in Lunacy, two Official Referees, and three Registrars in Bankruptcy!



An Unqualified ——— ?—With the politics of the "Hawick Advanced Liberal (Gladstonian) Association," we have nothing to do. Nor have we anything to do with those of its secretary. For one purpose only, we allude to the language

of this gentleman, which otherwise might as well have been left in obscurity. When returning thanks the other night for re-election to office, he made reference to the late Registration Courts, at which, it seems, he had appeared as agent for his party. He was objected to on the ground that he was not a qualified lawyer—a proper objection. The Sheriff seems to have sustained the objection—it humbly appears to us, a proper decision. Wherefore, at the meeting referred to, and in the course of the speech referred to, this secretary of the “Hawick Advanced Liberal (Gladstonian) Association” “maintained that Sheriff Boyle Hope had shown partiality”! A moderate and carefully-considered charge, no doubt; because, as will be obvious to the least intelligent, to admit the *locus standi* of a qualified law agent on the one side, and to reject the *locus standi* of an unqualified something else on the other, is to show undue favour to the employers of the former. The fiery gentleman went on to say that the treatment he had received was just what any non-professional Radical pleader might expect from a Tory judge, who, by the grace of a Tory Government, occupied a seat on the bench. And so forth; and it is indeed hard that this versatile and obviously discreet person may not practise medicine, dispense drugs, practise law, or do sundry other things, without a qualification. But what has the candidate for the Border Burghs to say to this unseemly charge? Does he approve of the language of his supporter, or will he publicly repudiate so disgraceful an attack on his brother advocate?



Solicitors and Legal Education.—By those who have turned attention to the subject and are qualified to judge, it has been felt for some time past that the matter of Law Agents' Examinations is not in a satisfactory position. Consequently it is with pleasure we learn that steps have been taken to secure some measure of reform. The examiners under “The Law Agents (Scotland) Act, 1873,” recently presented to the Lords of Council and Session a statement on the subject, in which they suggest certain alterations on the existing regulations. At present a law agent is required to pass three examinations. (1) There is the Apprentices'

Entrance Examination (including English Composition and Writing to Dictation; Arithmetic, Simple and Compound, with Vulgar and Decimal Fractions; and the Elements of Latin). (2) Next there is the General Knowledge Examination, which embraces (a) History of England and Scotland, (b) Geography, (c) Arithmetic, (d) Book-keeping, (e) Latin, *Æneid I. and II.*, and (f) Logic (*Jevons'*) or Mathematics (*Euclid I., II., III.*). (3) Finally, there is the Examination in Law, embracing (a) The Law of Scotland, Civil and Criminal (*Erskine's Institutes, Bell's Principles, Hume's Commentaries*); (b) Conveyancing; and (c) Forms of Process, Civil and Criminal. The chief change now proposed is the abolition of the Apprentices' Entrance Examination, and the substitution therefor, at entrance, of the General Knowledge Examination—leaving no subsequent examination in General Knowledge. The object in view is, of course, to raise the standard of examination, and every one who has at heart the true interests of the profession will welcome the proposal. The examiners say that the great majority of those who present themselves for the Apprentices' Entrance Examination are too young, and are not sufficiently advanced in general education to be desirable apprentices. It is accordingly suggested that, after the lapse of three years from now, there shall be only one examination in General Knowledge, to be passed *before* indenture. The subjects of examination would be—(1) English Composition and Writing from Dictation; (2) History of England and Scotland; (3) Geography; (4) Arithmetic; (5) Latin; (6) Logic (*Jevons'*) or Mathematics (*Euclid I., II., III.*); and (7) Book-keeping. Candidates would have it in their option either to take the whole of these subjects at one examination, or in two divisions at successive examinations—the first four at the first examination, and the remainder at the second. The examiners state with regard to book-keeping, that, while the subject is an important one, their experience has been that the young men who come up for examination are not well versed in it. It is, therefore, proposed that examination in book-keeping should not be made an indispensable preliminary to entering upon indenture, but that candidates should have the option of taking it at a later stage, or even along with their exam-

ination in law. These changes, no doubt, will raise the standard of general knowledge required from candidates, and will secure both greater culture on the part of law agents, and a better foundation for their legal studies. Two minor proposals also are made for the consideration of the judges—viz.: An improvement in detail in the mode of conducting the examination in Latin, and the commendable and convenient suggestion that the Higher Grade Leaving Certificates shall be accepted in place of passing in the corresponding subjects at the Entrance Examination.

* * *

So far as they go—and they go some length—the above proposals are to be commended. It must not be forgotten, however, that many additional reforms have been suggested. Notably this has been the case in the quarter where, presumably, the present measure of improvement has had its origin. In April 1890, the Council of the Society of Solicitors before the Supreme Courts framed an exhaustive report on the position of legal education in Scotland as affecting the Solicitors' branch of the profession. All the proposals now made were in substance insisted on in that report, and the Society were disposed to proceed much further on the same lines—rightly so, as it seems to us. Very reasonable, for example, was their recommendation that a Higher Grade Leaving Certificate in any three subjects (of which Latin must be one) should exempt the holder from having to undergo *any part* of the General Knowledge Examination. In a report drawn up last month, moreover, they suggest that a certificate (including Latin) of the Senior Local Examinations of any of the Scottish Universities should be accepted instead of the General Knowledge Examination. Amongst the other proposals made by the S.S.C. Society that have not been given effect to in the present report to the judges were (1) the institution of an *intermediate* Law Examination, to obviate the overcrowding of so much study into one examination, and the consequent tendency to cram; (2) the constant changing of the *personnel* of the examining body, to prevent "crystallising," by the introduction from time to time of variety and wider experience in different branches of the law; and (3) a publication of their

accounts by the examiners, and a modification of fees. There is much to be said for each one of these. They ought to be brought under the attention of their lordships now. It is not too much to expect at least that they will one and all be carried into effect in time.

* * *

The Decay of Procedure.—It is becoming more and more difficult to snatch a victory in the Court of Session on those minor technicalities of procedure which once supplied the alert practitioner with the most deadly sort of small arm in the legal armoury. It is well, probably—in the interests of what is known as “substantial justice”—that this should be so; at the same time, it is impossible to witness, without a shade of professional regret, the decadence of accurate legal scholarship which the disregard of these *minutiæ* implies. A signal proof of the unpopularity (with the Court) of technical objections to competency, based on the niceties of procedure, was afforded the other day by a decision of the Second Division, refusing to put out of court a reclamer who had failed to comply with the provisions of section 18 of the Judicature Act of 1825. That is the section which defines the competent method of reclaiming. The reclamer is to box his printed note and record, and “shall at the same time give notice of his application of review by delivery of six copies of the note to the known agent of the opposite party.” The section further provides that it shall not be competent to reclaim except “in the mode thus directed.” In the case referred to (*Allan's Trustee v. Allan's Trustees*), the reclamer had, by inadvertence no doubt, delivered no copies of the printed note and record to the opposite agent at boxing, nor even at the time when the case appeared in the Single Bills, and the note had been sent to the Roll in the ordinary course before the respondent was aware that the note had been presented. The respondent then had the case enrolled in the Single Bills, and moved that the note should be dismissed as incompetent in respect of the reclamer's failure to comply with the statutory requirements. The Court refused the motion with expenses, holding that the provisions with regard

to the delivery of the printed copies were directory merely and not imperative, and that the respondent had not suffered any prejudice by the respondent's default. In *Lothian* (7 S. 525) the copies were delivered, not at boxing, but before the case appeared in the Single Bills, and this was held sufficient compliance with the Act. A contrary result was reached in *Bell* (8 S. 1007), in which—as in *Allan's Trustee*—the copies had not been furnished when the note appeared in the Single Bills; and a similar decision was pronounced in very clear terms by Lord Mackenzie in *Fraser* (1 D. 886). A more recent case, which illustrates the stringency with which the provisions of section 18 regarding printing have been enforced (even in recent years), is *Muir* (2 R. 26). In that case the record had been amended in the Outer House, and the amendments were written in MS. on the printed records boxed along with the reclaiming note. This was held fatal to the competency of the note, the section expressly requiring the copies of the record to be “printed.” But a precedent for reading the section in a less literal fashion was found by the Second Division in the case of *Campbell* (6 M.P. 563), where it was held that the provisions of section 18 regarding the delivery of printed copies of the note and record were not imperative, but directory, the competency of Campbell's reclaiming note being sustained, although the reclamer had delivered his six printed copies to the opposite agent only on the morning of the day when the case appeared in the Single Bills. The mischief of relaxing the strictness of such rules as these is, that it introduces uncertainty into the methods of procedure. In no case, however, will a reclamer be safe in disregarding any of the provisions of section 18, for, should the respondent be able to show that he had suffered any prejudice, even though slight, in consequence of the respondent's failure, it is pretty certain that the Court would use the power which the section undoubtedly puts in their hands to punish the reclamer by dismissing the note as incompetent, in which case—if the reclaiming days were out—his only chance would be an application to have himself reponed on payment of expenses, and he would have to support such an application by showing that his default was due to inadvertence merely.

Lord Selborne.—The Earl of Selborne has now reached the zenith of his glory. No further honour can await him. The American Bar Association, at its recent meeting, awarded him a gold medal for his eminent services in the cause of legal reform. His name has, therefore, been much in American mouths of late. One transatlantic magazine concludes a biographical notice of his lordship with the following anecdote:—A predecessor on the woolsack, Lord Westbury, better known for legal erudition and a caustic tongue than for exaggerated saintliness, was told, on the occasion of Lord Selborne's appointment, that his motto was *Palma virtuti*. "I suppose," he lisped out, "that that means 'the palm to Palmer.' It is very appropriate. I have always considered that his character was *unredeemed by a single vice*."



The Training of Judges.—The September number of *Blackwood* has a notice of the late Lord Justice-General Inglis, in which a just tribute is paid, by a thoughtful, competent pen, to his outstanding greatness as a judge. In the course of the paper, the author incidentally criticises the existing fashion of training judges. Neither it, he says, "nor the circumstances under which judicial business is carried on in Scotland, are perhaps calculated to produce the highest kind of judicial excellence. It almost seems to be in spite rather than because of such antecedents and surroundings that we occasionally see the spectacle of a great judge on the Scottish bench. . . . What in fact, in the majority of cases, has been the training of judges in this country? An education not so much directed to the principles of jurisprudence as to case law, the styles current in conveyancing and pleading, and the habits and customs of offices; a sudden immersion of the early successful counsel in the practice of advocacy, in which he is expected, not as falsely suggested on the stage, to make the worse appear the better reason, yet to present with all the acuteness of his intellect one side of the causes in which he is engaged; a transfer almost as sudden to the service of party; and, finally, an elevation to the bench, often due to party services or exigencies, and not to the answer to the simple question whether the person chosen is the best qualified to

administer justice. And what is the result we desire to obtain? A mind free from political or any other bias, able to see every side of a dispute, yet fixing, as if by instinct, on the right side; quick but patient, never overlooking details, never allowing details to hide principles; looking to all that can be fairly said for every litigant, practising habitual reticence in speech and command of temper, checking by a look or a word not merely untruth but inaccuracy or verbosity; reasoning with mathematical precision, and deciding with logical clearness and brevity. The transformation from an advocate to a judge is, or should be, almost as complete as one of the secret metamorphoses of nature." No one will be disposed to dispute the truth of these reflections. At the same time, however, it ought not altogether to be left out of view, that many of our judges have the advantage, so far as it goes, of a preliminary judicial training in their capacity as Sheriffs before they ascend the bench of the Supreme Court. The amount of judicial work is considerable, and most of them occupy the position for some time.



EVEN such slender qualification as this, however, cannot be urged to the force of the following remarks on the same subject:—"The law of Scotland is still a wide field, which has absorbed into its native soil some of the best constituents of the civil and canon law of European as well as English jurisprudence. But its practice has been cribbed, cabined, and confined. While its independence was conceded at the Union, its jurisdiction was gradually shorn of several of the departments which force lawyers to take a large view of affairs. It is now seldom concerned with constitutional questions—either International or Maritime Law in the wider sense, or the problems which the Colonies and Dependencies present for judicial solution to the Supreme Courts of England. The parliamentary monopoly of an important class of matters really litigious, and the accident which has separated the commercial from the judicial centre of Scotland, have brought about other limitations sufficiently obvious. It is scarcely possible for a Scottish judge to attain to the same kind of excellence as distinguished Hardwicke, Mansfield, or Stowell."

Special Articles.

UGHT A FOREIGN DEFENDER TO BE COMPELLED TO SIST A MANDATORY?

THIS question is one in the decision of which the Courts have recently shown a tendency to disregard a long course of precedents, and it appears to be worthy of consideration whether they have acted wisely in doing so.

The main reason for ordaining a foreign party to sist a mandatory is, of course, that the parties may litigate upon a footing of equality as regards expenses. If the foreign party is allowed to litigate without a mandatory, he is practically in the happy position of being able to say to his opponent, "Heads, I win; tails, you lose;" for a decree for expenses against a foreigner is practically unenforceable.

The rule that a foreign pursuer must sist a mandatory is to all intents an absolute one; and in the older cases, particularly (*Pengman*, 17 D. 122), the Courts seem to have gone upon the principle that the rule in regard to defenders was equally absolute. It is difficult to see any difference in principle between a pursuer and a defender in this respect. There can, of course, be no suggestion that a pursuer is, as a rule, more to blame than a defender for a litigation. The truth is probably the other way. Nor can there be any ground for suggesting that a pursuer who calls a foreign defender into the courts of this country is to be put to a disadvantage upon that ground. There must (unless where a question of jurisdiction is raised) be a good ground of jurisdiction against the foreign defender.

To impose a penalty or disadvantage upon a pursuer who invokes the jurisdiction of our Courts against a foreigner is to introduce a distinction between one kind of jurisdiction and another,—an idea wholly inconsistent with principle, and opposed to all considerations of expediency.

The Courts, however, for whatever reason, have for a long time made a distinction in this respect between pursuers and

defenders. Beginning by holding that a defender might, if he showed some very special ground for it, be excused from sisting a mandatory, they have in later cases gone practically the length of holding that, *as a general rule*, a foreign defender is not to be called on to sist a mandatory. In a recent case (unreported), *Hill, Paysen, & Co. v. Svensson*, the Lord Ordinary in the Outer House refused to ordain a foreign defender to sist a mandatory,—the only specialty alleged being an averment that the pursuers had used arrestments on the dependence, and thereafter voluntarily withdrawn them upon consignation of a sum only slightly over the principal sum sued for. The case thereafter proceeded to proof in the Outer House, and the defender, having been unsuccessful, reclaimed. The First Division not only approved of the Lord Ordinary's original refusal to ordain a mandatory to be sisted, but held that the fact of the pursuers holding a judgment in their favour was not sufficient to entitle them to demand, as a condition of the appeal proceeding, that a mandatory—who might be made responsible for the expenses of the appeal—should be sisted. The pursuers were eventually successful, and were then left with a decree for the expenses of a protracted and expensive litigation, and no means of enforcing it except the very problematical ones of seeking the assistance of the Courts of the defender's residence or of finding some funds or effects of the defender in this country.

The effect of this decision, if it is to be followed in future, will be to put the Courts in a very awkward dilemma. Henceforward a pursuer who founds jurisdiction against a foreigner by the use of arrestments, and thereafter arrests upon the dependence of the summons, will have to keep in view that he must, if his proceedings are to be profitable, arrest funds belonging to his debtor sufficient in amount to pay not only his debt, but also the whole expenses of a litigation which may possibly be appealed to the House of Lords and may involve an expensive proof. Nor can he safely consent to withdraw his arrestments unless on consignation or caution to meet these possible expenses. On the other hand, the party whose funds have been arrested may petition for loosing of arrestments, and can point to a long list of precedents entitling him to have the arrestments

withdrawn upon consignation of a sum very slightly exceeding the sum sued for.

The Court will, sooner or later, have to choose between two alternatives, each of which will involve a setting aside of recent precedents. They must either go back upon their refusal to ordain foreign defenders to sist a mandatory, or they must recognise that, where a foreign defender's effects are arrested, he is not entitled to have them loosed except upon caution or consignation to meet all possible costs of a litigation. If they do not take one or other of these courses, they will have to recognise, in so many words, that a pursuer who wishes to invoke jurisdiction founded by arrestment must do so with the knowledge that, if he wins, he will have every reason to expect to have his own expenses to pay. This practically means the abolition of jurisdiction founded upon arrestment. Meanwhile members of the profession who meet with cases of this kind are placed in a position where they can hardly act in accordance with precedents, for the precedents are self-contradictory.

The solution likely to be adopted, is to stipulate, as a condition of the withdrawal of arrestments in such a case, that a mandatory *shall* be sisted, without raising the question before the Court.

This is the best comment possible upon the soundness of the Court's recent decisions.

T. D.

DIVORCE IN FRANCE.

PRIOR to the Revolution of 1789, marriage was regarded by the law of France not only as a civil contract, but as a sacrament. It was a holy bond, indivisible and indissoluble save by death. Such was then, and is still, the doctrine of the Church of Rome. But the Revolution rudely divested marriage of its sacred character before the law. Marriage then became but an ordinary contract, where, in the eye of the law, religion had no place. So, mutual consent was made sufficient to dissolve the bonds of matrimony. Even such consent was unnecessary; either spouse might obtain freedom

upon stating that further cohabitation was prevented by incompatibility of temper. These were drastic changes in social legislation, and greatly concerned the Catholic majority of France. The alteration in the law was too drastic and too suddenly adopted, and accordingly, during the Restoration, the abolition of divorce upon any ground whatever was but a natural sequence. For nearly seventy years after 1816, divorce was obliterated from the Civil Code.

After prolonged agitation, the Law of 27th July 1884 was passed, by which the remedy of divorce was again introduced. This Law substantially re-enacted the original grounds of divorce with the exceptions of mutual consent and incompatibility. Its passage indicated the waning political influence of the Catholic clergy, and the increasing power of the Socialist vote. One of the arguments of a prominent promoter of the Law in the Chamber of Deputies was, that it would act as an antidote to marriage, which this member took leave to regard as the cause of prostitution, abortion, and infanticide!

The grounds upon which an action for divorce is lawful under the Law of 1884 are—(1) Infidelity; (2) Cruelty; and (3) Sentence of a criminal Court, rendering the convicted person infamous and entailing the loss of civil and political rights, such as penal servitude for life or a term of years. On each of these grounds, the right of action is competent to either spouse. In the equal right of both spouses to this remedy, French law is in advance of English law, which favours the husband in the limited grounds upon which it sanctions divorce. In permitting cruelty as a ground of divorce, French law again differs radically from English and Scottish law, by both of which it is only admitted as a warrant for judicial separation. Imprisonment does not operate in Scotland, as in France, as a ground for divorce, or even as justifying judicial separation. It is worthy of consideration whether an innocent spouse should not have some means of redress when deprived of a consort through a sentence of penal servitude. Such a sentence generally prevents future conjugal felicity. The convict, if not in law, is often in fact regarded as dead by the consort. French law, as we see, provides a remedy; but it might be asked why

it does not, with equal reason, make any provision for insanity supervening after marriage. The laws of France and England alike exclude desertion as a ground of divorce, so long distinctive of Scottish law.

The procedure by which divorce is obtained in France is very different from the Scottish practice. The spouse, anxious to raise an action, must, first of all, attend the court in person, and formally ask leave from the judge to bring it. If through illness the intending suitor is unable to attend the court, the judge, along with the clerk of court, will obligingly, as in duty bound, visit the pursuer at his or her residence. After hearing the pursuer, the judge grants an order for the citation of both parties before him on a subsequent early day, and meanwhile, if the wife be the applicant, the judge will assign her a separate residence at the husband's expense, when the circumstances require it. On the day appointed, both parties being present, after listening to the rights and wrongs of the spouses, the judge endeavours to effect their reconciliation. This is a unique feature of French law, and is an imperative step prior to the institution of many other proceedings; *e.g.* in disputes between heirs concerning heritable property, with reference to which and similar actions the parties must, in the first instance, prefer their complaints to the Justices of the Peace with a view to conciliatory arrangements. It is, more often than not, purposeless. Indeed, commercial disputes, from this consideration, as well as that of promptitude, are saved from the necessity of the preliminary appeal to the "friendly offices" of the judge. The reconciliation process is a relic of the original Peace Courts of Holland. In the likely event of the failure of the judge to restore harmony in this initiatory stage of the divorce proceedings, or in the absence of the delinquent spouse, the judge then issues his warrant to the applicant, authorising the prosecution of an action. It is open to the judge, in doing so, to make provisional orders with regard to aliment, custody of children, and possession of matrimonial property.

The action of divorce, raised in virtue of the preceding licence, is disposed of in the same way as other causes in the French courts. At any time, however, during the course of the action, the pursuer may restrict his or her request to

judicial separation merely, instead of divorce *a vinculo matrimonii*. The children of the marriage are not received as witnesses. Their absolute exclusion, although prompted by the desire of preventing the members of the family from acting as partisans, seems too rigorous. The want of their evidence must frequently bar a decree of divorce, otherwise justly warranted. In our own courts there is no doubt in such proceedings a growing disposition on the part of the judges to refuse, or at least to discount, the evidence of children of tender years. This is wise and salutary. But the French law, rejecting every descendant, whether of full age or no, seems to go too far in the exclusion of testimony.

On the right to divorce being established by proof, the Courts do not immediately grant decree. They must allow a delay not exceeding six months to elapse. This the law intends as the last opportunity for the reconciliation of the spouses. After the expiry of the given delay without the desired result, decree of divorce will then be pronounced. The decree is publicly notified in the judicial gazettes, and the requisite entry is made by the Registrar of Marriages in his official books. The press is prohibited, under a penalty of from £4 to £80, from publishing reports of divorce proceedings; while the tribunals are empowered to dispose of the cases with closed doors.

The innocent spouse retains all benefits accruing by marriage contract or otherwise, while the offending spouse forfeits all his or her rights in favour of the other. There is the singular provision, unknown in this country, that the guilty spouse may be ordered to maintain the innocent spouse, if without other means of support, *after* the divorce is granted, in an alimony not exceeding a third of the income of the spouse in default.

The marriage of the guilty spouse with a paramour, after divorce is pronounced, is illegal. In certain cases, infidelity is dealt with as an indictable offence under the Penal Code. The marriage of such parties is also thought to be contrary to Scottish law, at least when the name of the paramour appears in the recorded judgment of the Court. The name of the accomplice is, however, now rarely so inserted; but in this

accommodating partners in guilt, it is questionable whether the practice is conducive to the best ends of public policy.

Some interesting statistics in reference to the working of the Divorce Law are, in a recent number of the *Juridical Review*, given by Mons. Jules Challamel, a French lawyer. From the official returns, as completed to 31st December 1887, it appeared that 14,582 divorces had been obtained in the three and a half years since the promulgation of the Law. In 1887 the number was 5797. Mons. Challamel anticipated that the Government returns for the subsequent years, 1888-90, would show gradual increase. The urban centres, especially Paris, contributed by far the greater proportion of cases. The artisan and labouring classes represented 53 per cent. of the various grades of the population classified in the official returns. The instances in which the wife was pursuer far outnumbered those in which the husband stood pursuer. Again, of the very large number of decrees granted in 1887, it is rather a remarkable fact that two-thirds were obtained free of expense to the litigants through the Public Offices of Legal Assistance. It is commonly observed in connection with our own courts that causes, particularly consistorial, in which one or other of the contending litigants is on the *Poor's Roll*, are yearly increasing. Happily their number has not as yet interfered with the proper conduct of other judicial business, as it seriously seems to do in the Parisian tribunals.

Mons. E. Glasson, one of the law professors in the University of Paris, and an eminent author, makes some eloquent observations upon the subject of divorce, which are well worthy of citation. In one of his works, *The Elements of French Law*, published in 1884, shortly before the passing of the Divorce Statute, he writes:—"The Civil Code regulates marriage as it ought to be, and rightly considers the family and property as the two foundations of the social fabric. The law which approves of monogamy, with no other sanction than death for its dissolution, is alone in consonance with morality. . . . Divorce is detrimental to good morals. It disintegrates the family. The highest interests of womankind, of good living, and of society itself, demand *impérieusement* the prohibition of divorce."

In its wisdom, the French Legislature has thought differently. But there are not wanting many in France who advocate the repeal of the Divorce Act, finding one of their strongest arguments in its practical results. It may well be that divorce, too easily obtainable, is pernicious to the well-being of France; and if further experience should so prove, the present law will doubtless receive the reconsideration of the Legislative Chambers.

G. W. W.

INGLIS AT MADELEINE SMITH'S TRIAL.

BY ONE WHO WAS PRESENT.

FOR more than the third part of a century I have been engaged in the practice of the legal profession, and one of my earliest recollections of a court of justice, with which in after years I was to be so familiar, is my being present on the day on which Dean of Faculty Inglis addressed the jury for the defence in the Madeleine Smith trial. At that time I was a young beginner in a Dundee office, and like everybody else in Scotland, whether connected with the law or not, I followed the progress of that remarkable trial with absorbing interest. There were no evening papers in those days; but the morning issues were eagerly devoured, and passed from one hand to another—for papers and pennies were not so plentiful then as they have since become. For myself the trial had a peculiar personal interest, for I knew L'Angelier, the supposed victim, well, and had often rowed with him in the same boat upon the Tay before he went to Glasgow. Peace to his ashes! but he is now so long dead, that there is no harm in my remarking that the opinion I formed of his character from our personal intercourse was not a high one.

Well, I was burning with anxiety to hear a part of the trial, and, most of all, to listen to the speech of the Dean of Faculty for the defence. In these days young practitioners looked upon Inglis as a sort of demi-god at the bar, and nobody doubted but that his speech for the defence would

be a masterly and eloquent oration. Fortunately, I had a friend in Edinburgh who happened to have special influence in securing admission to the court. I was delighted to learn from him that I might come over on the day the Dean was to speak, and count upon securing admission to the court. Of course I took him at his word, and came; and an excellent place indeed I secured in the centre of the front gallery, just behind the clock, and facing the bench. The court was crowded, and every one was full of suppressed excitement, which increased and broke out in a murmur when the prisoner took her place in the dock, a female warder beside her, and a policeman on either side. Madeleine seemed the most composed person in the whole court. It was said at the time that when led across the Parliament Hall on her way to the court, she exclaimed, glancing round the broad expanse of well-laid flooring—"Oh, what a lovely place for a dance!"

In his tribute to the late Lord President the other day, the Lord Justice-Clerk remarked upon his constant attention to detail, which, as the Justice-Clerk, with characteristic frankness, admitted, is not always an attribute of men of high parts. This study of detail was obvious even to a novice like myself on that first and only occasion on which I heard Inglis at the bar. Everything was studied with scrupulous care to produce the greatest possible effect upon the minds of the jury. The prosecuting counsel, Solicitor-General Maitland and Mr. Donald M'Kenzie, appeared (Lord Advocate Moncreiff had left the night before on the conclusion of his speech to attend to his parliamentary duties); the junior counsel for the prisoner, Mr. Young and Mr. Moncreiff, were in their seats. The judges (Justice-Clerk Hope, and Lords Ivory and Handyside) took their places on the bench; but still the Dean was not there. There was a moment or two of still suspense, and then at last, when all attention was ready to be rivetted upon him, he sailed majestically into the court, carrying in his hands a bundle of folio sheets, which he laid upon the table in front of him. There is a constant oral tradition that after the jury returned the verdict of "Not proven," Madeleine Smith stretched out her hand to shake that of her counsel, but the

Dean, ignoring her movement, kept his hand by his side and walked coldly past, and from this it has been argued that, though his eloquence secured her acquittal, he himself believed her guilty. I was not present on the following day when the trial concluded, and therefore I cannot speak from personal observation as to what then took place. But this I can affirm, for I saw it, that before he began his address to the jury on her behalf, Inglis shook hands with his client, the prisoner. This, of course, is not inconsistent with the other story: when the trial was over, his duty was discharged; whilst the trial was proceeding, duty required him to attend to every detail that might produce a favourable impression; and one of these details might be to shake the hand of his client, albeit he believed the hand to be that of a murderess.

Before addressing a jury, it is the invariable practice for counsel to turn to the Bench and say, "May it please your lordship." Inglis did not do so on this occasion. I have heard it said that he was not too friendly with Lord Justice-Clerk Hope; but I do not credit it, that the usual words of courtesy were omitted owing to any want of respect for the presiding judge. I believe that Inglis thought that in the peculiar circumstances the highest effect would be produced by his allowing no movement or utterance to come between himself and the jury from the moment he took his place at the table to address them. Be that as it may, the first words which he uttered were:—"Gentlemen of the jury, the charge against the prisoner is murder, and the punishment of murder is death; and that simple statement is sufficient to suggest to us the awful solemnity of the occasion which brings you and me face to face."

It is usual in the Justiciary Court-room for the counsel who sits on the far side of the table from the jury to come round the table to the side next the jury when his turn comes to address them. But Inglis did not do so on this occasion, whatever his usual habit may have been. He spoke from the far side with the table in front of him, and between him and the jury.

I mentioned the bundle of notes which the Dean brought

with him into the court. These notes were written on sheets of folio paper, and were very voluminous. From my place in the gallery above, I could see them clearly, and I noticed that they were all written in large or, rather, enormous characters. I could compare their appearance to nothing so much as to that of sheets of paper over which a pigeon dipped in ink had been sprawling. These large characters were, no doubt, designed to enable the Dean to read his notes with facility without stopping, and as he passed from passage to passage of his oration, he deftly laid sheet after sheet to the side.

The speech lasted four hours, and it produced a most powerful impression upon all present in the court. Contemporary opinion unanimously ascribed to it the prisoner's acquittal, and the student of the trial will not be disposed to quarrel with that judgment, for on paper the case seems proved as clearly as any case of murder by poisoning well could be. The reports of the trial speak for the matter of the Dean's address, but of the manner of the speaker throughout my recollection does not enable me to specify details further than that the impression thereby produced upon the imagination was very great, and that the delivery was deliberate, solemn, and weighty rather than vividly impassioned.

Shortly after the Dean had concluded his address, the Justice-Clerk began the summing up, which occupied the remainder of the day and a part of the next. I must have heard the first portion of it, but it has left no distinct impression on my mind. What remains, and always will remain, graven in my memory is the picture of the great centre figure of the trial, who was not Madeleine Smith, but Dean of Faculty Inglis.

IS "BELL v. CHEAPE" SOUND LAW?

[THE following simulated case, in which the above question is ably discussed, was the prize essay in the Scots Law Class in Edinburgh University for last session. The author is Mr. Evan J. Cuthbertson.]

R. D. MUDDLETON and ANOTHER (John Smith's Trustees), *Nominal Raisers*.—A. Wigg—Bland.

THOMAS JONES, *Claimant (Reclaimant)*.—B. Glib—Keene.

JOSIAH HIGGINS, *Claimant and Real Raiser (Respondent)*.—Sol. Gen. Gowne—Sharpe.

Testament—Legacy—Vesting subject to defeasance—Postponement of period of payment—Destination to person named and his heirs, executors, or assignees whomsoever—Conditional institution.—In a trust disposition and settlement, truster directed his trustees to hold his whole estate for the purposes of the trust. A liferent of the residue was provided for his sister; and he directed his trustees, on the expiration of the liferent, to make payment of the residue to his sister's issue, whom failing, then to A., "his heirs, executors, or assignees whomsoever." A. survived the testator, but predeceased the liferentrix, having left a will: the liferentrix afterwards died without issue.

In a competition between the executor and the residuary legatee of A.—*Held*, that the bequest of the residue under the truster's settlement vested in A., *a morte testatoris*, and was carried by his will to his residuary legatee; and that the words, "his heirs, executors, or assignees whomsoever," were introduced to prevent a lapse of the bequest in the event of A. predeceasing the testator.

John Smith, of Comely, Birnam, left a trust disposition and settlement, dated 12th February 1869, whereby he conveyed to the trustees therein named—of whom Richard David Muddleton, Writer to the Signet, Edinburgh, and Alexander Woodhead, chartered accountant, Glasgow, the Nominal Raisers, are now the sole survivors—his whole means and estate, heritable and moveable.

After providing various annuities and legacies, John Smith directed his trustees to dispose of the residue thus:—

"And lastly, with regard to the residue of my said estate and effects, heritable and moveable, real and personal,

above conveyed, I hereby direct and appoint my said trustees to make payment to my only sister, Miss Mary Anne Smith, at present residing at No. 26 Buckingham Terrace, Edinburgh, of the rents, interest, dividends, and annual profits of the same, during her life, and exclusive always of the *jus mariti* and right of administration of any husband whom the said Mary Anne Smith may marry; and, after her death, my said trustees are hereby directed to make payment of the said residue to the lawful child or children of the said Mary Anne Smith, equally among them, share and share alike, and to the issue of such of them as may have predeceased leaving issue,—such issue succeeding to the share which would have belonged to their parents if in life. And, in the event of my said sister dying unmarried, or without leaving issue, then my said trustees shall make payment of the said residue to my lifelong friend, William Higgins, ship-builder, Glasgow, and to his heirs, executors, or assignees whomsoever."

John Smith, the testator, died in 1877. He was survived by his sister, the said Mary Anne Smith, the liferentrix, who was then unmarried, and by the said William Higgins.

William Higgins died in 1888, predeceasing the liferentrix. He was survived by one son, Josiah Higgins, and he left a testament, by which, after bequeathing sundry legacies, he provided that whatever residue there might be of his means and estate, the same should be paid over at his death to his nephew, Thomas Jones, wood merchant, Leith.

On 1st December 1889, Mary Anne Smith, the liferentrix, died unmarried, having up to that date received the interest of the residue.

After her death, a question arose as to whom the residue under the settlement of John Smith, now freed from the liferent of Mary Anne Smith, belonged; and a multipointing was raised in name of John Smith's trustees, the real raiser being Josiah Higgins.

Josiah Higgins claimed the residue (which was entirely moveable) liferented by the deceased Mary Anne Smith, as substitute called in the destination to "William Higgins, his heirs, executors, or assignees whomsoever," contained in the trust disposition and settlement of John Smith, on the

ground that, being his only son, he was heir *in mobilibus* of his father, William Higgins.

Argued for him:—That the legacy of the residue to William Higgins was conditional upon the death of Mary Anne Smith, the liferentrix, without leaving children or their issue then alive; that the destination being to William Higgins, his heirs, executors, or assignees whomsoever, and William Higgins having predeceased the liferentrix, and so died *pendente conditione*, the legacy never vested in him, and that Josiah Higgins, his only son and heir, was entitled to it as substituted in the destination to his father; that the testator's intention must be gathered from the deed itself; and that the words, "his heirs, executors, or assignees whomsoever," imported a destination over, and consequently barred vesting in William Higgins,—even vesting subject to defeasance in the event of the liferentrix leaving issue; that the word "assignees" conferred on William Higgins no authority to assign until the residue vested in him; that it did not vest, and that therefore, as "heirs" and "executors" take before "assignees," Josiah Higgins, his heir, must be preferred.¹

Thomas Jones claimed the residue as residuary legatee under the testament of his uncle, William Higgins. He argued—That the legacy of the residue on the death of John Smith, the testator, vested in William Higgins subject to defeasance in the event of any child or children of the liferentrix, or their issue surviving her; that William Higgins had in that case the right either to assign his interest or otherwise to dispose of it, and that it was carried by his

¹ Authorities for heir:—*Burden v. Smith*, 1738, Cr. & Stewart, p. 214; 3 Ersk. 9, 9. *Hope v. Graham*, Feb. 17, 1807, F.C.; vide also M. App. voc. Legacy No. 3. *Beaton*, June 7, 1821; 3 Ersk. 5, 2. *Clelland*, June 15, 1839, 1 D. 1031. *Provan*, Jan. 14, 1840, ante vol. ii. p. 298. *Downie v. Buchanan*, Feb. 12, 1830, 8 L. 516. *Wright v. Ogilvie*, July 9, 1840, 2 D. 1357. *Bell v. Cheape*, May 21, 1845, 7 D. 614. *Ross v. King*, June 22, 1847, 9 D. 1327. *Young v. Robertson*, Feb. 14, 1862, 4 Macqueen 314; 34 Scot. Jur. 270; 2 Pat. 1108. *Laing v. Barclay*, July 20, 1865, 3 Macph. 1143; 38 Scot. Jur. 95. *M'Laren, etc. (Bryson's Trs.) v. Clark, etc.*, Nov. 26, 1880, 8 R. 142. *Boyd v. Denny's Trs.*, Dec. 15, 1881, 9 R. 299. *Haldane's Trs. v. Murphy*, and cases there cited, Dec. 15, 1881, 9 R. 295, p. Lord Pres. Inglis' opinion corrected in *Steel's Trs. v. Steel*, Dec. 12, 1888, 16 R. 204 at 209. *Hay's Trs. v. Hay*, June 19, 1890, 17 R. 961.

testament; that the fact that the gift was made indirectly through a trust was immaterial in a question of vesting, as also the fact that the period of payment was postponed; that the interposition of a liferent, and even of a contingency such as in the present case, was also immaterial; that William Higgins was the *prædilecta persona* of the testator; and that the words of the destination should not be read in a sense prejudicial to the interests of William Higgins, if any other meaning can reasonably be put upon them; that the addition of the words "heirs, executors, or assignees whomsoever" did not imply a destination over; or, if it did, then that assignees were substituted as well as heirs and executors, and excluded them, as in all other cases; or, that the addition of the word "assignees" implied the grant of a power of nomination to William Higgins, and that that power was exercised by him in his testament when he made Thomas Jones his residuary legatee, practically bequeathing to him his whole property; that *Bell v. Cheape* is no longer sound law.¹

The Lord Ordinary pronounced the following interlocutor:—"Repels the claim of Thomas Jones, sustains the claim of Josiah Higgins, and ranks and prefers the said Josiah Higgins upon the whole fund *in medio* in terms of his claim. Finds no expenses due to either party, etc."

OPINION.

John Smith, by his trust disposition and settlement, conveyed his whole estate to trustees. He directed them, *inter alia*, to hold the

¹ Authorities for residuary legatee:—*Wallace v. Wallace*, Jan. 28, 1807, M. App. voce Clause No. 6. *Lawson v. Stewart*, June 20, 1827, 2 W. & S. 625. *Leitch v. Leitch's Trs.*, Feb. 17, 1829, 2 W. & S. 366. *Smith v. Lauder*, May 30, 1834. *Marchbanks v. Brockie*, Feb. 18, 1836, 14 S. 521. *Maxwell v. Wylie*, May 25, 1837, 15 S. 1005; 9 Scot. Jur. 460. *Clark's Exrs. v. Paterson*, Dec. 5, 1851, 14 D. 141. *Cochrane v. Cochrane's Exrs.*, Nov. 23, 1854, 17 D. 103. *Donaldson's Trs. v. Macdougall*, 22 D. 1535. *Nimmo v. Murray's Trs.*, June 3, 1864, 2 M. 1144; 36 Scot. Jur. 571. *Carleton v. Thomson*, Feb. 11, 1865, 3 M. 514; aff. July 30, 1867; 5 M. H. L. 151; 39 Scot. Jur. 640; L. R. 1 Sc. App. 232. *Snell's Trs. v. Morrison*, Nov. 4, 1875, 4 R. 709. *Gilbert's Trs. v. Taylor*, July 12, 1878, 5 R. 49; 5 R. H. L. 217. *Hal-dane's Trs. v. Murphy*, and cases there cited, 9 R. 269. *M'Alpine, etc.*, March 20, 1883, 10 R. 837. *Waters' Trs. v. Waters*, Dec. 6, 1884, 12 R. 253. *Steel's Trs. v. Steel*, Dec. 12, 1888, 16 R. 204. *Gregory's Trs. v. Alison*, May 8, 1889, 16 R. H. L. 10. *Earl of Dalhousie's Trs. v. Young*, May 24, 1889, 16 R. 681. *Hay's Trs. v. Hay*, June 19, 1890, 17 R. 961.

residue in liferent for behoof of his sister, Mary Anne Smith, and for her lawful children and their issue in fee. He further directed that, were his sister to die unmarried or survived neither by lawful children nor by their issue, his trustees should in that event pay over the said residue to his lifelong friend, William Higgins, shipbuilder, Glasgow, his heirs, executors, or assignees whomsoever.

William Higgins outlived the testator, but predeceased the liferentrix, leaving one son. Shortly before his death he executed a will, in which he in substance conveyed his whole property in his possession, or to which he might have right at the time of his death, to his nephew, Thomas Jones. The liferentrix has since died unmarried; and Josiah Higgins, the only son of William Higgins, claims the residue of John Smith's estate, set free by the death of the liferentrix, on the footing that, as his father predeceased the liferentrix, he was not in a position to deal with the residue by his will. He has, accordingly, requested the trustees to convey the residue to him, in virtue of the direction in the trust disposition and settlement of John Smith. In short, he claims as substitute to his father.

Thomas Jones, on the other hand, claims that the residue of John Smith's estate was carried by the will of his uncle, William Higgins. That will was in his favour, and he also has demanded from the trustees payment of the residue.

Thomas Jones, the nephew, has, in substance, put forward alternative pleas. His first is, that the residue under John Smith's settlement vested in his uncle, William Higgins, as soon as John Smith died, subject to defeasance only in the event of the liferentrix leaving a child or children, or their issue. William Higgins was consequently in a position to assign *inter vivos*, or *mortis causa*, although the liferentrix was still alive, and might possibly marry and have issue. He did not exercise this right during his lifetime, and it must therefore be held—it is contended—to have been transmitted at his death by his will, which, as already explained, is in favour of the nephew.

On the assumption that the residue vested in William Higgins on the death of the testator, there is, I think, no doubt that it would be carried by his will; but I consider it unnecessary to enter at any length into this, for, in the first place, it is not disputed by the other claimant; and, in the second place, I am unable to grant the assumption that the residue ever vested in William Higgins. In this view of the matter, then, the point is immaterial.

The general presumption in regard to the vesting of legacies is, that the right of fee vests *a morte testatoris*—that is to say, on the death of the testator. Yet I take it to be sound law, settled by a long course of decisions, that such presumption is at best but a *presumptio juris*, liable to be elided by other circumstances that singly or conjointly are opposed to it. Such a circumstance, it has been held, is the insertion in a settlement of a destination over, in conjunction with a postponement of the period of conveyance. And

plainly so. The purpose of a destination over is to provide, in proper technical language, a means whereby, without verbosity, a testator can, in the exact order he pleases, prefer a series of persons to be the objects of his bounty; and the period when this preference is to operate may very properly be indicated by him, by means of the machinery of a trust, and a direction to the trustees to convey the gift at a date named, or on the occurrence of a certain event. If one or more of the persons so favoured die before the date or period fixed by the testator for conveyance, then they can acquire no right in virtue of the settlement, and can in no way influence the destination of the gift. They, as it were, drop out of the series, and those named next in order, and surviving, come in their stead. In the words of Lord President Inglis in *Bryson's Trustees*¹—“When nothing is expressed in favour of a beneficiary, except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and, failing him, to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period, he takes no right under the settlement.”

Now, I find in John Smith's settlement such a destination, and such a postponement of the period of conveyance as I have referred to; and, looking to the whole circumstances of the case, I see no reason for differing from the view laid down by Lord President Inglis in his judgment in *Bryson's Trustees*, from which I have just quoted.

I have said that the fact of there being a conveyance to trustees, and not a direct gift to the beneficiaries, supports the presumption, raised by other circumstances, that vesting is postponed till the death of the liferentrix. For the nephew, it has been very forcibly urged, and authorities have been quoted to show, that the form of the gift of the residue is immaterial, and goes no length towards ascertaining the period of vesting; and that it is of no moment whether the residue was given direct, or, as in the present case, through a trust. I cannot assent to this, nor, in my view, do the authorities quoted support the contention. What *Nimmo v. Murray's Trustees*,² and kindred cases, have decided is, that *by itself* the machinery of a trust raises no presumption in favour of a postponement of vesting, or, at least, not one which is strong enough to override the general rule that a legacy vests *a morte testatoris*. But in ambiguous cases it is, I hold, very different. Where there is a destination over, and a period fixed when payment is to be made, then the fact that there is no direct gift to the beneficiaries, but a direction to trustees to convey at that period, is, in conjunction with these other circumstances, not only material, but all-important; it conclusively shows that the testator's intention was to suspend vesting until the period of conveyance.

It has similarly been argued that postponed payment is as consistent with vesting as with not-vesting. It would be more accurate to say that postponed payment is not sufficient, in itself, to overturn

¹ 8 R. 142, at p. 145.

² 2 Macph. 1144.

the presumption for vesting a *morte testatoris*. The same is true of a destination over, a conditional institution, the interpolation of a liferent, a contingency, or the machinery of a trust. Each circumstance, if by itself, may be disregarded ; but, when they have to be looked at conjunctly, they become most pregnant, and must be reckoned with. Singly, it may be that they raise no presumption, either one way or the other ; taken together, they cannot be ignored, and become, I think, conclusive of the suspension of vesting.

It has been further contended for Thomas Jones that his uncle, William Higgins, was the *prædilecta persona* of the testator ; that it was the testator's intention to give the fee to him ; and that his heirs, executors, and assignees were not intended to be called as substitutes to their author, but that the words are a mere subterfuge,—words of style,—an invocation, in short, of the law of intestacy, which it was not essential to insert at all, but which indicates the fulness of the grant to William Higgins.

I am not moved by this argument. Though strongly relied on by the Lord Ordinary in the case of *Bell v. Cheape*,¹—a case nearly identical with the present, and one whose authority I see no reason to question,—it was rejected by the whole Court. In vesting, the *regula regulans* is, there is no doubt, the testator's intention ; but a court of law, in endeavouring to find that intention, must look primarily to the settlement itself. If what it finds there is not doubtfully expressed, then it must look to that *solely*, and it must construe it strictly, according to the ordinary rules of interpretation. To look farther afield, and to take into consideration other evidence, however strong, showing a contrary intention to that expressed in the settlement, is not within its discretion. If the terms of a will are clear, then the testator's intention is just what that will is legally held to mean ; that, and nothing else. Moreover, where technical words are used,—words which, in order to avoid verbosity, uncertainty, and consequently litigation, legal custom has determined shall have a fixed and definite meaning,—such words must be rigidly construed in their technical sense, and in no other.

But an attempt has been made to show that the terms of the will in regard to the destination are not clear ; that the phrase, "to his heirs, executors, or assignees whomsoever," may be read, not as a destination over, but as a mere invocation of the law of intestacy. Such a view is at variance with the maxims *verba aliquid operare debent*, and *verba cum effectu accipienda sunt*. Let it be granted that the phrase may be read in two senses. That sense which renders the clause superfluous must be rejected in favour of the other, if that other supplies a reason for its presence. Moreover, had William Higgins predeceased the testator, his heirs would certainly have taken, though not *as* his heirs, for no right had vested in him which could descend to them, but as substitutes under John Smith's settlement ; and I am unable to see on what grounds it is maintained that, as soon as William Higgins survives

the testator, the words, that had previously undoubtedly indicated a destination over, dwindle into a mere surplusage.

That "heirs and executors" are on the same footing as "assignees" in this destination has been rejected in *Bell v. Cheape*. The character of the assignees of William Higgins is obtained exclusively from the will of William Higgins; and, if he was not in a position to assign or test upon the residue, they cannot claim. But his heirs and executors are, as was laid down in *Bell v. Cheape*,¹ merely a class of persons fixed and designated by the law, and not in any degree constituted or dependent on the act of the ancestor, from whom they, in these circumstances, take nothing but the relationship by the denomination of which they are called as third parties and directly to a share of the testator's succession. They might very well have been substituted though nothing was given to William Higgins; they might have been substituted, that is, as individuals designated merely by that relationship. The assignee is not a substitute, and cannot rank along with the heirs and executors for a share of the residue, still less can he be preferred to them.

Had this clause of "heirs, executors, or assignees whomsoever" not been inserted in the destination, the case would have been very different; and, looking to recent decisions, I should have been compelled to hold that the fee of the residue vested in William Higgins subject to defeasance in the event of the liferentrix leaving issue; but holding, as I do, that the addition of these words imports a destination over, and, looking to the whole circumstances of the case, I am of opinion that the fee of the residue of John Smith's estate did *not* vest in William Higgins.

It remains for me now to consider the alternative plea of the nephew, namely, that, although the fee of the residue did not vest in his uncle, yet the addition of the words "and assignees" to the ulterior clause of the destination gives a power to William Higgins to nominate a person who should, in the event of his death before the fee vested in him, be preferred to the residue; in other words, it is contended that the phrase, "and assignees," gave to William Higgins a right to assign what did not vest in him.

Such a power of nomination is unusual, and cannot easily be presumed to exist; and I know of no case where it has been decided that these words imply such a power. The case of *Clark's Executors v. Paterson*,² which has been referred to, settled no such thing; for there it was held that the interest had vested. Moreover, if such a power of disposal is given, it must be exercised expressly; and I cannot but regard it as significant that William Higgins never expressly made use of his supposed right of assignation. There is not the slightest evidence to show that he was ever aware of such a power; and, where an extraordinary power is nowhere expressly taken advantage of, there is the strongest presumption that it is not granted at all. There is no evidence here sufficient to rebut this presumption. Even were it to be assumed that we have in John

¹ 7 D. 614, at p. 637.

² 14 D. 141.

Smith's settlement a power of nomination given to William Higgins, I should be slow to affirm that the latter's will, which does not in any way refer to it, was to be regarded as an exercise of that power.

A careful consideration of the pleas put forward and the authorities cited has led me to the conclusion that the residue never vested in William Higgins, and that his will in no way influenced the destination. Josiah Higgins, his heir in moveables, is accordingly preferred to the fund *in medio*.

Thomas Jones, the nephew, reclaimed, and argued further that the maxim, *verba aliquid operare debent*, quoted by the Lord Ordinary in his opinion, did not apply to deeds of a testamentary nature; and that the testator intended the words, "his heirs, executors, or assignees whomsoever," added after the destination to William Higgins, to operate as a safeguard, which would prevent the gift lapsing should William Higgins predecease the testator.¹

The respondent adhered to his former arguments.

At advising, of this date (July 10, 1891)—

LORD PRESIDENT (after narrating the facts).—This case, involving as it does a re-examination of one of the most difficult branches of our law, the doctrine of vesting, demands our very anxious consideration. No legal principle has been found more difficult to apply in practice. Nearly every case that has come before our Courts has possessed circumstances and presented features that have completely differentiated it from its predecessors, and that have rendered it in a sense unique. These peculiarities could not be, nor were they at any time sought to be ignored by our judges; and the result has been twofold. Each case, to begin with, was decided on its own merits, and its attendant circumstances had a very material effect on the decision. But these decisions have been yearly accumulating; and now to no inconsiderable extent—how far has yet to be determined—have modified the doctrine itself which was originally applied to them; and we are to-day substantially asked to decide not merely whether this reclaiming note should be dismissed or sustained, but also whether or not a case, hitherto looked upon as an authority on the subject of vesting, should be any

¹ 3 Ersk. ix. 14. *Hay's Trs. v. Hay*, June 19, 1890, 17 R. 961.

longer so regarded. I refer to the well-known case of *Bell v. Cheape*, where, in 1845, it was held, in conformity with the opinion of a majority of the whole judges, that where a legacy was bequeathed to A., his heirs, executors, or assignees, in the event of B., who liferented the subject, dying without issue; and where A. predeceased B., having previously assigned the legacy, and B. afterwards died without issue, in a competition between the executor and the assignee of A., the executor was to be preferred.

This case of Smith's Trustees that we are now considering is parallel with that of *Bell v. Cheape*. In all essentials indeed the two are identical, and no further consideration on our part would be necessary, were it not that recent decisions, both in this court and in the House of Lords, which illustrate and develop the doctrine of vesting subject to defeasance, have seemed to undermine the foundations on which the opinions in *Bell v. Cheape* were built, and have seemed, as a consequence, largely to detract from their value. Moreover, in *Hay's Trustees v. Hay*,¹—a case that came before this Court at a recent date,—the case of *Bell v. Cheape* was cited by counsel as an authority. It was held that it had no bearing on the question then at issue; but Lord Shand, in delivering his judgment, took the opportunity to express grave doubts as to whether the law as there laid down is, at the present day, sound law, and consistent with the lately developed doctrine of vesting subject to defeasance. "While it was, no doubt"—I quote his Lordship's words—"a case of authority at the time when it was pronounced, it may be a question whether it is of the same authority now. Since that date our law has been more matured on the subject of such destinations, and the doctrine of vesting subject to defeasance has assumed a much greater importance, and has received effect in a way which it had not done when the case of *Bell v. Cheape* was decided. It may be that if such a case were to come up now for decision, it might be now successfully maintained that there would be vesting in the person named, subject to defeasance in the event of issue being born to the liferenter, keeping in view that there was no destination over after the person named, and 'his heirs,

¹ 17 R. 961, at p. 967.

executors, or assignees' . . . Whether the authority of that case is or is not affected by the maturing of the law, I do not say, but I think a similar destination admits of being now presented in quite a different light."

Lord President Inglis, who followed Lord Shand, expressed a contrary opinion, to the effect that he saw no reason at all to question the authority of *Bell v. Cheape*.

The Lord Ordinary, in his opinion in this case of Smith's Trustees, has considered *Bell v. Cheape* an undoubted authority, and he has accordingly mainly relied on it in his grounds of judgment. In the ordinary case I should have been inclined to follow his lead; for it is somewhat unusual, I confess, for a Division to refuse, without re-examination, to accept as authoritative and sound law what has, after anxious deliberation, been laid down by the whole Court, and what has for many years stood unquestioned. But in all the circumstances, which I have deemed it necessary to narrate fully, the present seems a fitting opportunity to review, in the light of recent cases, the grounds of judgment in *Bell v. Cheape*, which, as I have said, are mainly those relied on by the Lord Ordinary in the present case.

Our inquiry will best be furthered if we address ourselves in the first place to answer the question,—Did or did not the fee of the residue of John Smith's estate vest in William Higgins? For in *Bell v. Cheape* the decision proceeded on the assumption that no fee vested in the conditional institute; and, indeed, the assignees themselves eventually conceded that. This question answered, then the ground will, to a very large extent, be cleared.

It is a trite observation that our law favours vesting and abhors an undetermined fee. Yet a legacy does not vest in the donee until the death of the testator; because until that event he may revoke or alter his gift, and the fee is therefore still in him. But on his death the presumption is that the fee at once, *ex lege*, by force of law, vests in the legatee. This leading presumption is based on the ground that the testator was likely to have intended the persons favoured in his will to enjoy his bounty to the fullest extent, and as soon after his death as might be consistent with the safeguarding

of the rights of those to whom the testator was indebted, and of the rights *inter se* of the beneficiaries. It will thus be seen that—while immediate payment is barred by the claims of creditors, and, it may be, by the conflicting rights of the beneficiaries—vesting may, notwithstanding, take place *a morte testatoris*, to the effect that the beneficiary, though he is unable to finger the actual subject of the legacy, is yet at liberty to dispose of it *inter vivos* or *mortis causa*; to the effect also that his creditors may attach it, or that his heirs may take it on his death. If the beneficiary has no *jus dominii*, he has at least a *jus crediti* capable of being assigned, attached, or carried to his heir.

Now this grand presumption, that a legacy vests *a morte testatoris*, can only be got rid of by the contrary intention of the testator. That, once it is found, must be given effect to. It may be *express*, as where he lays down, in direct terms,—in so many words,—the date of vesting. And, as a rule, that date will be adhered to, though not in all cases; for it will be held *non scriptum* should it be found to be irreconcilable with the whole tenor of the deed. Or, and this is the usual case, the contrary intention may be *implied*. No actual date for vesting is given, but the granter's intention may be more or less easily gathered from the terms of the deed; and our Courts have established, by a long course of decisions, that where a certain clause or expression, or a combination of clauses or expressions, is discovered in a testamentary deed, the granter thereof shall be held to have intended that his gifts should vest in the beneficiaries at such and such a date.

It is hardly disputed that the existence of a trust is of itself no proof that the testator intended vesting to be postponed. As a rule, a testator has confidence that, by means of a trust, his intentions will be carried out to the letter. By means of it his estate, after his death, can best be managed, and more especially so in cases where the period of distribution is likely to be at a date distant from that of his decease; and, moreover, during that period the rights of life-renters and others can best be safeguarded. It may be that, where trustees are named for the security and benefit of conditional institutes, the presumption for vesting is not so

strong; but the tendency of recent decisions is to minimise this; and I can by no means agree with the Lord Ordinary in thinking that, when a trust is found in conjunction with the other circumstances he names, it is an all-important factor, or that it conclusively shows that the testator's intention was to suspend vesting. Whether all these circumstances he mentions are present in this case or not, I shall have to consider immediately; but even if they were present, I should not be inclined to go as far as his lordship. The reasons I have stated would, it is admitted, be sufficient to induce the testator to create a trust; and, when there are added the special circumstances conceived by the Lord Ordinary, these reasons do not disappear. On the contrary, the longer the period of conveyance of the property is postponed, the more forcible do they become; and I am disposed to ascribe the creation of the trust entirely to them, rather than to assume that the testator intended thereby to imply a postponement of vesting.

Nor does the postponement of the period of payment till the death of a liferentrix suspend vesting. The comparatively recent case of *McAlpine v. Stewart and Others*¹ is conclusive of this. There it was held that, where the sole reason for the postponement of payment is the right of an annuitant, or the protection of a liferent or liferents, the law holds that vesting will take place *a morte testatoris*, unless there be a provision or clear expression to the contrary effect.

It is argued for the respondent that, in this case now before us, there are other and more cogent reasons than the mere protection of a liferent for the postponement of vesting, and, among them, a substitution, or, as it is otherwise called, a destination over, in favour of parties other than the fiars first named. Now, in this case of *Smith's Trustees*, the fee was to go, after a liferent to Miss Smith, to her children, should she marry, or to their issue; failing them, then to William Higgins, his heirs, executors, or assignees whomsoever. It will simplify matters, and aid us in our inquiry, if we drop in the meantime the last clause of this destination, namely, the words, "his heirs, executors, or assignees whomsoever," and, for the nonce, consider what the law has to say about a

¹ 10 R. 837.

destination to the children of the liferentrix and their issue, whom failing, to a person named. We shall then be in a position to discuss what modification the last clause may have upon the whole.

The exact terms of the destination are contained in the "lastly" clause in John Smith's settlement; and in sketching the facts of the case I have already read it. We will reserve consideration, as I have said, of the concluding words of the clause. The fee is given to one class of persons, and there is the conditional institution of another donee in a certain event, *videlicet*, the liferentrix dying childless, an event which may never happen. The vesting here might be one of three kinds. It might be vesting (1) *a morte testatoris*, absolutely; or (2) on the death of the liferentrix, that is, at the date when the property is to be conveyed; or (3) *a morte testatoris*, but subject to defeasance. If the conditional institute predecease the testator, in no case does anything vest in him. That was once for all settled in *Hope v. Graham*.¹ If the conditional institute survive the testator, but predecease the liferentrix, then, in the first and third views of the case, he had a vested interest, though the nature of the vesting in the one differs from the nature of the vesting in the other. In the one case it is absolute, in the other it is subject to defeasance in a certain event. On the other hand, if the second view of the case be adopted, he is in the same position as if he had predeceased the testator; nothing vests in him. The first view, that of absolute vesting, may at once be dismissed as untenable, and we are left to choose betwixt the second and the third, no vesting at all, or vesting subject to defeasance in a certain event—namely, the liferentrix leaving issue.

Now, when I turn to the opinions expressed by the judges in the case of *Bell v. Cheape*, I find that not the majority only, but the whole of the judges, take up the view that, although the conditional institute survives the testator, yet if he predeceases the liferentrix, nothing vests in him capable of being assigned. (I am still putting aside the ulterior clause of the destination and the effect it may have on the whole.) Lord President Inglis, in correcting a mistake in the report of his

¹ M. App. *voce* Legacy No. 3.

judgment in the case of *Haldane's Trustees v. Murphy*,¹ has said that the judges in *Bell v. Cheape* decided no such thing, because there was the addition of the clause, "to his heirs, executors, or assignees." It is true that that additional clause did form part of the destination; but, if his lordship intends to say that in regard to the question of vesting the judgments in *Bell v. Cheape* were founded to any extent on the addition of these words, I must respectfully take leave to differ from him. On turning to Lord Justice-Clerk Hope's opinion on page 620, I find these words: "It is a direction or bequest conditioned expressly on a certain event—that at the death of Miss Susan Buchanan [the liferentrix], there shall be no child of hers, or issue of any such child, existing. . . . I think this is a conditional legacy, and that no interest vested in Miss Mackintosh during the lifetime of Susan Buchanan capable of being transmitted by assignation. . . . If the legacy is conditional, then I think it necessarily follows that it did not vest so as to be capable of being transmitted by assignation." Lord President Boyle says (p. 632): "It is only a conditional legacy, incapable of being assigned till it vested; that is, given." And Lord Ivory expresses himself thus (page 622): "I am of opinion—(1) That the residuary bequest . . . was a conditional bequest. (2) That the nature of this condition was, that the bequest should take effect, only 'in the event that there shall be no child or children of the body of the said Susan Buchanan, or their issue, existing at her (Miss Buchanan's) decease;' and hence, that there could be no vested right in any one prior to Miss Buchanan's decease."

Nowhere do I find the view taken that the addition of the words, "heirs, executors, or assignees," had any material bearing on the question of the vesting or not-vesting of the legacy in the conditional institute. It did not vest, not because there were these additional words, but because the legacy was conditional. As the conditional institute died before the condition was purified, nothing vested in her.

There is not the slightest doubt that this view is not, to-day, a sound one. It is utterly at variance with the doctrine of vesting subject to defeasance—a doctrine that, in its

¹ 9 R. 269, at p. 278, corrected in *Steel's Trustees v. Steel*, 16 R. 204, at p. 209.

present application at least, would be entirely novel to the judges who decided *Bell v. Cheape*. One of the earlier cases in which it came to the front was that of *Snell's Trustees v. Morrison*.¹ There Lord Shand was of opinion that there is no reason against holding a fee to vest, not as an absolute right and indefeasibly, but subject to the contingency of its being defeated. The general scope of the principle is best defined by Lord Blackburn in *Taylor, etc., v. Gilbert's Trustees*.² His lordship's words are these:—"It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once, which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event, but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that the testator intends the gift he gives to be vested subject to being divested, rather than to remain in suspense. As there is no more than a presumption of his intention, it must yield to anything in the testamentary deed which shows a contrary intention."

Our Court was slow to admit this doctrine, and in *Haldane's Trustees v. Murphy*³ a decision to the opposite effect was pronounced by a majority of seven judges. Since then, however, the House of Lords have, in *Gregory's Trustees v. Alison*,⁴ again forced on us its acceptance, and the doctrine has been applied in *Earl of Dalhousie's Trustees v. Young*,⁵ and in *Steel's Trustees v. Steel*,⁶ and may now be regarded as fixed law.

So far as we have gone, then, it would seem to follow that William Higgins, the conditional institute, took a vested right on the death of John Smith, the testator; it only remains for us to consider whether the addition of the words, "heirs, executors, or assignees whomsoever," has any effect upon the vesting. Here *Bell v. Cheape* is of no assistance to us in forming a conclusion; because, despite the opinion of Lord President Inglis, I am inclined to think that the question was there neither discussed nor decided. We must there-

¹ 4 Macph. 709.

³ 9 R. 269.

⁵ 16 R. 681.

² 5 R. H. L. 217, at p. 221.

⁴ 16 R. H. L. 10.

⁶ 16 R. 204.

fore turn to other decisions for light as to the law on this point.

In *Cochrane v. Cochrane's Executors*,¹ a legacy was bequeathed to A. B. in liferent, to C. and heirs in fee. C. predeceased the liferenter, having previously assigned his interest. It was held, and I think rightly, that the assignee took; and the ratio of the decision was that the word "heirs" was not inserted with any special view of creating a destination over in favour of the issue of C. Similar decisions are to be found in *Hunter's Trustees v. Carleton*,² and *Hay's Trustees*.³ I need not go into the cases in detail; their general drift is to establish as sound law the ratio on which *Cochrane v. Cochrane's Executors* was decided, and which I have shortly stated above. It follows, then, that the words, "heirs, executors, or assignees whomsoever," are no destination over, as the Lord Ordinary in this case has assumed them to be. Had the heirs been mentioned by name, or by a description independent of the conditional institute, the effect might have been to suspend vesting. But they were described as "heirs, executors, or assignees whomsoever" of William Higgins, the conditional institute, and there is no ulterior destination. They are, in these circumstances, to be considered (in the words of Lord McLaren in *Hay's Trustees**) "as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit which it is possible for the truster to give him, consistently with the benefits previously given to liferenters or other persons."

Our inquiry is at an end; and its result, in my opinion, is that, contrary to the decision of *Bell v. Cheape*, the residue under the trust disposition and settlement of John Smith vested on his death in William Higgins, subject to defeasance only in the event of Mary Anne Smith, the liferentrix, leaving issue. The phrase, to "his heirs, executors, or assignees whomsoever" is not a destination over, but was inserted to prevent any lapsing of the bequest should the conditional institute, William Higgins, have died before the testator

¹ 17 D. 103.

² 17 R. 961.

³ 3 Macph. 514; aff. 5 Macph. H. L. 151.

* 17 R. 961, at p. 965.

This being so, it cannot be disputed that vesting gave to William Higgins the fullest liberty to dispose of his *jus crediti, inter vivos, or mortis causa*. It was carried by his will, and the residuary legatee under that deed must be preferred to his heir in moveables. I am accordingly for recalling the Lord Ordinary's interlocutor.

LORD GLENCARSE.—I have previously had an opportunity of reading your lordship's judgment, and my own view of the case is in entire accordance with it. I have long been of opinion that *Bell v. Cheape*, a case, I may say, that was decided solely on authority, and not on its merits,—whether it was sound law or not,—had the regrettable effect of defeating the intention of the testator, which, presumably, if there was no ulterior destination, was to favour the conditional institute named, rather than his heirs, who were not, it might be, in existence, or, at least, known to him.

This presumption is strengthened in the present case, as in *Bell v. Cheape*, by plain words of affection used of the conditional institute. I think that the doctrine of the *prædilecta persona* is too summarily dismissed by the Lord Ordinary in this present case. As he has himself expressed it, the testator's intention is the *regula regulans* in the construction of the deed. No doubt the terms of the deed are final if they are expressed in unequivocal language. It will make little difference though such an interpretation be, in its results, both absurd and inconvenient, and though it may be very certain that, had the testator foreseen and anticipated these consequences to which it was inevitable his words would lead, he would have left a will in very different terms. Still, if it can be discovered, the intention of the testator ought to receive the greatest consideration, and, if it does not plainly violate the ordinary rules laid down for the construction of destinations, it ought to be given effect to. Our law, I may confidentially say, is not alone among civilised systems of jurisprudence in construing *mortis causa* deeds in a more elastic manner than contracts. It has always dealt very leniently (often to its own confusion) with writings of a testamentary nature, and I am inclined to think that this somewhat novel application of the doctrine of vesting subject

to defeasance, which has been developed to so great an extent of late by this Court and by the House of Lords, is but an expression of the anxiety of the law to reach, and if possible to give effect to, the intention of the testator.

It has been urged by counsel for the respondent that it was really the testator's intention that no fee should vest in William Higgins, but that his heirs were called as substitutes, in order that, were he to predecease the liferentrix, and his estate be insolvent, his family, and not his creditors, would get the benefit of the testator's bounty.

This argument is ingenious, but nothing more. It is the safeguarding of an interest in an event, unlikely to happen, to the detriment of that interest, should the ordinary state of matters ensue. It would be to put a forced construction upon the words of the destination which they will not bear, and without any evidence adduced in support of it. Had such actually been the testator's meaning, he would, I think, have expressed himself more clearly, and would, I am certain, have made, at the same time, the safeguard against bankruptcy more secure. But, indeed, it is a sufficient answer that the vesting of the residue in the conditional institute on the death of the testator, instead of being an unfortunate occurrence, might very well have the effect of averting bankruptcy.

I am inclined to sustain the reclaiming note on the grounds set forth in your lordship's judgment, and on the further ground that William Higgins is the *prædilecta persona* of the testator, and, it is to be presumed, that the testator wished to give to him, at as early a date as possible, the fullest control over the residue of his estate consistent with the rights of those who preceded him in the destination. While those other rights prevented the conditional institute from actually handling the money till the death of the liferentrix without lawful issue, they are not to prevent him from acquiring a *jus crediti* in it capable of being assigned, bequeathed, or attached. Nor has the addition of the words, "his heirs, executors, or assignees whomsoever," such an effect. These are there just because William Higgins is the *prædilecta persona* of the testator, and therefore they cannot reasonably be held to injure or curtail his right in the residue; on the contrary, they strengthen it, inasmuch as they provide that, should he pre-

decease the testator, the bequest of the residue should not lapse, but be taken by the legal heirs of the conditional institute. In this view, no doubt, the word "assignees" is useless, and here, I think, we must fall back on the authority of Erskine, who considers it as only a word of style.

LORD ERROL.—I concur with your lordships in sustaining the reclaiming note, and in general I agree with the opinions already expressed. I wish, however, to consider the concluding remark of Lord Glencarse about the word "assignees," and, in doing so, to take exception to what the Lord Ordinary has said thereanent.

The Lord Ordinary, assuming for the moment that the phrase "heirs, executors, or assignees whomsoever" might be construed to mean either a destination over or a mere invocation of the law of intestacy, dismisses the notion that it can be held to be the latter, because in that case the words would mean nothing, and would thus be a violation of the maxim *verba aliquid operare debent*; that, in other words, the phrase must be read in that sense which makes it an integral part of the deed.

I dispute the applicability of this maxim to the present case. In contracts and other documents that are wont to be construed as *stricti juris* it may have force, and very great force; but it is out of place in the consideration of a testamentary deed. Deeds of a testamentary nature, as it has been pointed out, are more favoured, and therefore receive a more liberal interpretation than obligations *inter vivos*; and the view expressed by Erskine is that, although the words should be ambiguous, or even improper, they ought to be interpreted according to the presumed will of the testator, if by any construction they can be brought to it; observe—not according to the sense in which the words are most forcible. Now the presumed will of John Smith is well known, and can be gathered from the terms of his settlement. It is clear, as Lord Glencarse has very properly emphasised, from the words of affection, and from there being no further destination, that William Higgins is the *prædilecta persona*. That being so, to read the words, "his heirs, executors, or assignees whomsoever," as a destination over would be to put on them

a meaning at variance with the intention of the testator; if no other meaning can be found for them, they must be read as an invocation of the law of intestacy. And what is more natural than that the testator, if his purpose was to vest the fee of the residue in William Higgins *a morte testatoris*, should, in order to make this purpose of his quite clear and unmistakeable, explain that the effect of such vesting will be the power of assignation,—that the fee will be not only to William Higgins, but also to his assignees whomsoever? It is perhaps worth while pointing out also that, even if we follow the Lord Ordinary, and read the phrase, "heirs, executors, and assignees whomsoever," as a destination over, we would be still further away from satisfactorily accounting for the word "assignees,"—for, as "assignees" can compete neither with "heirs" nor with "executors" in a destination over, the word is absolutely without meaning, until a right vests in the conditional institute, and in that case we fall back once more on the theory that the word is an invocation of the law of intestacy.

There is not nearly so much difficulty attending the construction to be put on the words, "heirs and executors." They are not mere words of surplusage, nor, as the Lord Ordinary assumes, indicative of a destination over. In a third sense in which they may be read, they perform a very important function, and the maxim above quoted is thus, of course, quite useless in determining our choice between a destination over and this third meaning. I hold with your lordships that the purpose of these words is to prevent a lapse of the bequest in the event of William Higgins dying before the testator, *i.e.* before any right had vested in him. The Lord Ordinary is unable to understand on what grounds it is maintained that, as soon as William Higgins survives the testator, the words that had previously indicated a destination over dwindle into a mere surplusage. The ground of the contention is simply this, that it was the testator's intention that on his death the fee of the residue should vest in William Higgins, subject to defeasance in the event of the liferentrix leaving lawful issue. If William Higgins did not survive that date, then his heirs or executors took as substitutes; but if he did survive the testator, even though he

should predecease the liferentrix, then the fee vested in him and consequently all ulterior substitutions flew off.

I have thought it right to add these remarks to what has already been said, because they refer to a part of the Lord Ordinary's opinion that has hardly been touched upon.

LORD INVERGOWRIE.—I concur also. I do not think it necessary to add anything to the learned judgments already pronounced. In brief, the ratio of our decision is the testator's presumed intention. It is assumed that he meant the gift he gives to be vested subject to defeasance, rather than to remain in suspense, seeing that there is no ulterior destination. It is also assumed that the addition of the words, "his heirs, executors, or assignees whomsoever," was intended only to prevent the legacy of the residue lapsing should the conditional institute predecease the testator, and not to prevent him, the *prædilecta persona*, from acquiring a vested fee immediately on the testator's death.

The Court recalled the Lord Ordinary's interlocutor, repelled the claim for Josiah Higgins, and sustained the claim for Thomas Jones, and granted warrant accordingly.

Pen & Ink, S.S.C.—Andrew Scribble, W.S.—George F. Nibb, W.S.

Appointments.

SIR CHARLES PEARSON, Q.C., M.P., Solicitor-General for Scotland, has been appointed Lord Advocate, in room of the Right Honourable J. P. B. Robertson. Sir Charles was admitted a member of the Faculty of Advocates in 1870, and was called to the English Bar (Inner Temple) in the same year. After being Sheriff of Chancery, he was successively Sheriff of Renfrewshire and of Perthshire. Sir Charles for several years was Procurator of the Church of Scotland.

MR. A. GRAHAM MURRAY has been appointed Solicitor-General for Scotland. He was admitted to the Faculty of

Advocates in 1874. Mr. Murray recently resigned the office of Advocate-Depute, and became Sheriff of Perthshire. He has been elected member of Parliament for the county of Bute.

MR. EBENEZER ERSKINE HARPER, Advocate (1868), Sheriff-Substitute at Wick, has been appointed Sheriff-Substitute at Selkirk, in room of Mr. C. G. Spittal, deceased.

MR. DAVID J. MACKENZIE, Advocate (1879), Sheriff-Substitute at Lerwick, has been transferred to Wick.

MR. JOHN DOVE WILSON, LL.D., Advocate (1857), sometime Sheriff-Substitute at Aberdeen, has been appointed Professor of Law in the University of Aberdeen, in room of Dr. Grub, resigned.

MR. GRAHAM MARRABLE, S.S.C., has been appointed Depute-Clerk in the Outer House of the Court of Session, in room of Mr. George Shield, resigned.

Obituary.

MR. MALCOLM STEWART, Solicitor, a well-known practitioner in Perth, died in that city on 21st October, at the age of fifty-one.

The Month.

A Curiosity from the Reports.—In *C. & A. R. R. Co. v. May*, 108 Ill. 294, it seems the foreman said to his men, "Let the lumber go to the devil." Says Mulkey, J., "The order was obeyed." Query, How did Mulkey learn that?—*American Law Review*.

* *

Dog Evidence.—Mr. Joseph A. Willard, who for a quarter of a century and more has been the clerk of the Superior

Court for the county of Suffolk, Massachusetts, tells the following dog story :—A case concerning the ownership of a dog was on trial before a judge, noted as a combination of wit and stupidity. The trial had continued some time, and little had been accomplished when the judge remarked : “ Well, the only thing to do, it seems to me, is to find out in some practical way the real owner of the dog. Mr. Plaintiff, you stand in that corner, and Mr. Defendant, you stand in the opposite corner. Now, Mr. Clerk, you take the dog to the middle of the room. When I count three the gentlemen will begin to call, you let the dog go, and we will see what he will do.” Everything was done as ordered. At the signal from the judge the dog was released, and the plaintiff and defendant began to whistle and snap their fingers. The dog hesitated a moment, and then made a bee-line for an open door which chanced to be about midway between the two would-be owners. “ Enter the case undecided,” said the judge.

* * *

Divorce Statistics.—The *Economiste Français* publishes an interesting article comparing the recently compiled tables showing the number of divorces granted in France since the new law came into force, and in the United States and other countries during the same period. The French law of divorce came into force on the 1st August 1884, and in the five months of that year 1657 divorces were granted, the figures for the four following years being 4227, 2949, 3636, and 4708. The statistics which have been published in France do not come down later than 1888, and in that year, according to the writer in the *Economiste Français*, there were 23,472 divorces in the United States, this being nearly 4000 more than were granted in France, England, Italy, Germany, Holland, Sweden, Norway, Austria, Roumania, and Canada put together. Comparing the divorces in France and the United States with those of other countries, the following figures are given :—Germany, 6161 ; Russia, 1789 ; Austria, 1718 ; Switzerland, 920 ; Denmark, 635 ; Italy, 556 ; Great Britain and Ireland, 508 ; Holland, 339 ; Belgium, 290 ; Sweden, 229 ; Australia, 100 ; Norway, 68 ; and Canada, 12.

An Author's Memory.—*Apropos* of the authorship of law books, the writer of these lines went to consult a friend, a fellow-practitioner, on the law of a subject on which the friend had written a book. "My dear fellow," said the learned author, "why do you come to me?" "Because you have written a book on the subject," was the natural reply. "Well," said the author, "that is the very reason why I should be the last man you should consult. What little I knew on the subject I forgot as soon as I got it into print, and what I have not forgotten I never knew, but merely collated from various sources. Yet the book is a good book, and I am aware is a useful one, and we'll look up the point together." We did so with satisfactory results.—*Pump Court.*



Cruelty to Children.—The public conscience is far more alive than formerly to cases of cruelty to children, and it is very desirable that magistrates should realise the indignation caused by this, unfortunately, far too common offence. A strongly-worded protest appears in last Saturday's issue of an influential "lady's periodical" against what seems to the editor the inadequate sentence recently passed by a magistrate for an unusually refined and fiendish act of cruelty. A father who could dangle his three-year-old child out of a three-storey window till it was almost crazy with terror, and a mother who could thrash the child when dragged back into the room, deserved a very much heavier punishment than the one month's imprisonment which was inflicted. Notwithstanding the explanation (familiar to lawyers, though not so intelligible to laymen) why offences against property are more severely punished than those against the person, it is clear that certain classes of personal offences, and notably cruelty to children, should have exceptional treatment. Public opinion, supported by the Home Secretary, is probably sufficient to enforce this distinction; but if such is not found to be the case, legislation should provide a remedy without any unnecessary delay.—*Law Journal.*



Witnesses to Character.—A comical story regarding witnesses to character is told of Mr. Justice Maule, who, if report be

true—for he was before my time,—said more good things from the bench than many of his learned brethren. One day he was trying, for an offence of violence that I need not particularise, a hypocritical saint, who, as a matter of course, called a number of persons to speak to his character. As is usual on such occasions, their knowledge on the subject was very limited. On one point, however, they laid considerable stress. The prisoner was well known to them as a Bible-reader and a Sunday-school teacher. He was in fact, in their opinion, the very incarnation of piety and virtue. The evidence against the accused was overwhelming, and Maule proceeded, in no uncertain language, to sum up for conviction. On the conclusion of the learned judge's remarks, the prisoner's counsel jumped up and said: "I crave your lordship's pardon, but you have not referred to the prisoner's good character, as proved by a number of witnesses." "You are right, sir," said his lordship; and then, addressing the jury, he continued: "Gentlemen, I am requested to draw your attention to the prisoner's character, which has been spoken to by gentlemen, I doubt not, of the greatest respectability and veracity. If you believe them, and also the witnesses for the prosecution, it appears to me that they have established what to many persons may seem incredible, namely, that even a man of piety and virtue, occupying the position of Bible-reader and Sunday-school teacher, may be guilty of committing a heinous and grossly immoral crime."—"*Later Leaves*," by Montague Williams.



The Penal Servitude Act, 1891.—A great change in the law has been effected by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69). Hitherto five years has been the minimum term of penal servitude. Now and in future three years is the minimum. Where a Court has power to award a sentence of penal servitude, the sentence may, at the discretion of the Court, be for any period not less than three years and not exceeding either five years, or any greater period authorised by the enactment in force. Further, where under any Act now in force, or under any future Act, a Court is empowered or required to award a sentence of penal servitude,

the Court may, in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour. Another change enables a constable to take into custody, without warrant, any holder of a licence or person under supervision whom he reasonably suspects of having committed any offence. A third reform affects the power to grant licences in cases of unexpired terms. When an offender is undergoing a term of penal servitude in consequence of the forfeiture or revocation of a licence, a new licence may be granted to the offender in like manner as if the forfeiture or revocation of the previous licence were a sentence of penal servitude which the offender is liable to undergo. And where a person is sentenced on a conviction to a term of penal servitude, and by virtue of the same conviction his licence is forfeited, the term for which he is sentenced, together with the term which he is required further to undergo under section 9 of the Penal Servitude Act, 1864, shall, for all purposes of the Penal Servitude Acts relating to licences, be deemed to be one term of penal servitude, and those Acts are to apply as if on conviction of the offence the offender had been sentenced to the combined term. These, with smaller amendments of the law, go to make up what has not been the most noticed, but is not the least important, Act of the past session.—*Law Times*.

* * *

Libels relating to Justices.—As justices of the peace occupy a position, and exercise a jurisdiction which comes in conflict with many classes of persons, it is not to be wondered that they frequently require to complain, and also to be complained of. They are in these times seldom subjected to the questionable distinction of being the objects of criminal information, as was a common mode a century ago of appealing to the High Court against their conduct. In modern times a *mandamus* and a *certiorari* suffice for most of the requirements, and these do not involve any serious imputation on their integrity or knowledge of the law. Nevertheless there is much interesting material in the law reports to instruct those who are sometimes placed in difficult situations, seeing that their judicial, as well as administrative, functions touch

on so many subjects. We are indebted for a most important contribution to magisterial law to a case recently reported from Jamaica, which throws much light on the protection accorded to justices of the peace, who, in course of their administrative duties, have occasion to complain of persons in public situations. One of the chapters in the law of libel treats of those occasions, which are sometimes, though erroneously, called privileged, inasmuch as the libel complained of is the result not of any malice against individuals, but merely flows from the ordinary discharge of their duties by persons who fill a public situation. It is by no means easy to ascertain when an occasion is properly to be treated as privileged, for the consequence is to alter the burden of proof, in case of any action for defamation being commenced. The mere fact that the burden of proof lies on one side or the other is often all-important, and determines the issue of the litigation. Hence, it is useful to ascertain by what characteristics one may detect whether, and to what extent, malice is to be presumed from certain words or writings, or is to be proved affirmatively by the party who complains of it. The burden of proof will be seen to be a technical, and yet substantial, element in all litigations where justices are either libelled, or are charged with being themselves the libellers. The illustrations in the law reports are abundant, but only a few bring out with sufficient clearness this point. There were two leading cases on this subject before Lord Campbell, and other justices of the Queen's Bench. In one case, the clerk of the peace, and in the other a justice of the peace, was sued for defamation, and each set up and established a case of privilege. In *Cooke v. Wildes*, 5 E. & B. 328, the defendant, as clerk of the peace, submitted to the Quarters Sessions his account of the expenses of printing the register of county voters. Before doing this he had addressed a letter to the finance committee of magistrates explaining why he had taken away the contract for printing from the plaintiffs, who had hitherto been entrusted with that work. The clerk of the peace made his explanation, adding these words: "Particularly as the conduct of the persons who are chiefly employed by the county as printers and stationers is involved." The letter stated that, in comparing the plaintiffs' charges with those of other printers,

the plaintiffs had charged too much ; and the letter concluded thus : " Under the circumstances I have stated, it will be seen that I had no alternative but to adopt the course I have taken rather than submit to what appears to have been an attempt to extort a considerable sum from the county by misrepresentation." Lord Campbell had held at the trial that the occasion was privileged, but that the concluding words were not within the privilege, and this was afterwards the subject of argument before the full Court. The Court laid down a valuable rule after fully considering their judgment, and it was this : The doctrine is, that it is a matter of law for the judge to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice, constituting what is called a privileged communication ; and if, at the close of the case, there is no intrinsic or extrinsic evidence of malice, it is the duty of the judge to direct a nonsuit or a verdict for the defendant, without leaving the question of malice to the jury, as a different course would be contrary to principle, and would deprive the honest transactions of business and of social intercourse of the protection which they ought to enjoy. But the Court was equally clear that, even though the occasion is privileged, then not only the terms of the alleged libel, but extrinsic evidence may be given in order to show malice, and thereupon that question must be left exclusively to the jury. A case where a justice of the peace was plaintiff occurred at the same time, and the same question arose, for the clerk of the peace was treated in much the same category as the justice of the peace. In *Harrison v. Bush*, 5 E. & B. 344, the defendant was an elector of a borough and an inhabitant, and he and several hundred inhabitants sent to the Home Secretary a memorial, complaining of the plaintiff's conduct at a recent election of a member of Parliament. The memorial stated that the plaintiff made a speech inciting to a breach of the peace ; and, after reading the Riot Act, that he gave orders to a man to strike persons in the streets. The memorial asked the Secretary of State to order an inquiry, and if the complaints were substantiated to remove the plaintiff from the commission of the peace. At the trial of an action by the justice for defamation, the Court

held that, though the memorial had been addressed to a Secretary of State, instead of to the Lord Chancellor, still it was a mistake consistent with honesty, and that the occasion was privileged. But as both parties called evidence to prove and to rebut express malice, it was a question for the jury whether the malice had been proved. As Wightman, J., said, it was *primâ facie* a privileged communication. It was therefore incumbent on the plaintiff to show that it was not made *bona fide*, and for this purpose it was competent to him to show that the allegations were false in point of fact. That alone would not have been sufficient, but it would be a step towards showing that the defendant was actuated by improper motives. The defendant, in that case, satisfied the jury that he acted honestly, and hence he obtained the judgment of the Court. The difficulty in these cases is, undoubtedly, as to what is sufficient evidence of an abuse of the privilege under which the words were spoken or written. The point as to the burden of proof came out, perhaps, still more clearly in a case of *Clarke v. Molyneux*, 3 Q. B. D. 237, decided by the Court of Appeal. The plaintiff was a clergyman, and had been curate in charge of a parish, the vicar being absent on the Continent. The plaintiff was advertised to preach a sermon on a future day, whereupon the defendant went and told the clergyman at whose church the sermon was to be delivered, that there were bad accounts of the plaintiff, who had been expelled the army for cheating at cards, and had led a profligate life, etc. etc. An action being brought, the judge ruled that the communication was privileged, and left it to the jury to say whether the plaintiff had proved that the defendant spoke recklessly without due inquiry into the truth of the rumours. In other words, the judge told the jury that "honest belief" meant belief founded on reasonable grounds. The Court of Appeal held that that was wrong, for many persons might have an honest belief, though acting unreasonably. Brett, L.J., said that his notion of malice was, that it was doing a wrong thing from a wrong motive. He said that if it be proved that out of anger or for some other wrong motive the defendant has stated that which he does not know to be true, and he has stated it whether it is true or not recklessly by reason of his anger or other motive, the jury may infer that he used the

occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive. In short, the burden of proof that the defendant was actuated by malice lay on the plaintiff and not on the defendant. The matter was explained more pointedly by Cotton, L.J., thus: "When once the learned judge has laid down that the occasion was privileged, the only question for the jury to consider is, whether the defendant acted from a sense of duty or was actuated by some independent motive, and the *onus* of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, was on the plaintiff. In order to show that the defendant was acting with malice, it is not enough to show a want of reasoning power or stupidity, for those things of themselves do not constitute malice; a man may be wanting in reasoning power, or he may be very stupid, still he may be acting *bona fide*, honestly intending to discharge a duty. The question is not whether the defendant has done that which other men, as men of the world, would not have done, or whether the defendant acted in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty." A recent decision by the Judicial Committee of the Privy Council brings out the point as to burden of proof still more clearly (*Jenoure v. Delmege*, *ante*, p. 500). The appellant, Jenoure, was a justice of the peace in the island of Jamaica, and was sued for defamation by Delmege. Mr. Jenoure had addressed a letter to the inspector of constabulary to the effect that Delmege, a Government medical officer, was called to attend a woman in labour one Sunday; that, although implored to attend her, the plaintiff, Delmege, refused to do so without a fee, and that, consequently, the woman died on Monday morning from want of medical attendance. The letter went on thus: "I shall be obliged, in the interest of humanity, especially as I am informed it is by no means an uncommon occurrence for Doctor Delmege to refuse to attend such cases, if you will inquire into the matter, and, if the facts prove to be as stated, that you will report the case to the proper authority, as such wilful neglect cannot be allowed." An action being brought, the justice of the peace pleaded the truth of the facts, and that the occasion was privileged.

Evidence was given on both sides, and the jury found a verdict for the doctor, and the Court afterwards refused to order a new trial. The ground of appeal to the Privy Council was, that the judge had misdirected the jury as to the knotty point of express malice. The judge had told the jury that the occasion was privileged, but, nevertheless, that the defendant must satisfy the jury that he had made the communication with a belief in its truth. He also said that in no case was it required that the plaintiff should prove express malice; in other words, the judge told the jury that where a defendant claims privilege in respect of a charge of misconduct volunteered to him, it lay upon the defendant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and, unless that was made out to their satisfaction, it was not incumbent on the plaintiff to prove express malice. The Judicial Committee, in reviewing the judgment of the Jamaica Supreme Court, which defended the ruling of their Chief-Justice, held that such a ruling was wrong. The Court says that the privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, to prove affirmatively that he honestly believed the statement to be true. In such a case, the Judicial Committee says *bona fides* is always to be presumed. There was thus a miscarriage of justice in consequence of the ruling of the Chief-Justice. The jury were told that it was for the defendant to prove that he honestly believed the statements in his letter to be true; whereas the letter itself put those statements forward not as matters of the truth of which the writer had satisfied himself, but as matters calling for inquiry and consideration by the proper authorities. This decision of the Privy Council is thus a valuable protection to all justices who are called upon occasionally to point out the neglect of public officials.—*Justice of the Peace.*



Codification and Vagliano's Case.—*Vagliano's* case, recently decided in the House of Lords, is a painful reminder that the "uncertainty of the law" may not be wholly and at once removed by codification. It is a case on the meaning of the

English Bills of Exchange Act, in which it has been attempted to express the law in the form of a statute. The controversy turned on the construction of a certain clause of the Act, and the decision depended on the question whether the Act was to be interpreted with reference to the common law which it was intended to codify, or with reference only to the words of the Act. The trial Court decided in favour of the plaintiff. This decision was affirmed by the Court of Appeal by a vote of six to one. On appeal to the House of Lords, these decisions were reversed by a majority of six to two, so that, as Judge Chalmers says, in an article on the case in the *Law Quarterly* *: "Although the plaintiff has lost the day, he may still derive a melancholy satisfaction from the knowledge that eight judges out of fifteen have given opinions in his favour. and that the seven who were adverse to him by no means agreed as to the grounds on which his claim should be defeated." The clause in question was Section 7 (3) of the Bills of Exchange Act of 1882, by which it is provided that where the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer. Before the passage of the Act, the rule of law as stated by Judge Story was as follows: "If a bill is payable to a fictitious person or order, then, as against all persons who are parties thereto, and aware of the fiction, it will be deemed payable to bearer, in favour of a *bona fide* holder without notice of the fiction." Story on Bills, sec. 200. In this case the parties to the suit were not aware of the fiction; the bills were forged by the plaintiff's clerk, and the name of the payer was inserted for the purpose of obtaining his acceptance. It was a name of a real person, but not the name of a person having any real interest, and it was, as some of the judges held, fictitious so far as the bill was concerned. Five of the judges of the Court of Appeal, treating the Act as codifying the common law, held that the section must be read as if it contained the words *against any party with notice thereof*. Lord Esher dissented, and insisted that this construction required the addition of words to the statute. The House of Lords agreed with him, and Lord Herschell said he thought the proper course was, first, to examine the language of the statute and

* *Vagliano's case*, by M. D. Chalmers, 7 *Law Quarterly Review*, 716.

to ask what is its natural meaning, and not to start with inquiring how the law stood, and then assuming that it was intended to leave it unaltered, to see if the words will bear an interpretation in conformity with this view.

This case is a striking illustration of two important points in the controversy over codification. In the first place, it seems to suggest that codification may not always tend to certainty in the law, and the more so since the uncertainty begins with the question on what principle the statute is to be interpreted, and ends with the disagreement among all the judges of three courts; and, secondly, it shows that a code once enacted is a new source of law, and not merely an expression of old principles, so that it makes a complete change in the nature of the law. A code is not merely a means of summing up the law as it now is, for convenience of reference, but it is a body of rules for the Courts to interpret. The business of the Courts becomes henceforth interpretation of the rules rather than the administration of justice according to the established principles. It is true that Lord Herschell said: "The Bills of Exchange Act was certainly not intended to be merely a code of existing law;" but the same is true of every attempt at codification. Codification and law reform go together. The codifier is unwilling to crystallise the defects in the law. He very properly tries to make the law better before he gives it definite form. The new statute becomes the law to be administered, and the function of the judge is thereafter to ascertain the meaning of the words of the statute rather than to apply legal principles to the case before him. It may be that it is better that there should be definite rules easily accessible to the people as well as to the judges, but we doubt whether the people would read the rules and whether they would not rather continue to act according to their own sense of right, and leave it to the judges to decide between them; and this case shows that the rules themselves might be variously interpreted, and also that they, and not the established judicial sense of right, would be the foundation of the decision.—*New Jersey Law Journal*.

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A Disgrace to the Bench of Kansas. — The Central Law

Journal for 7th August has the following article on one M'Kay, a Kansas judge, which for plain speaking we commend for perusal to those unenlightened ones who do not think that it is proper for the legal press to censure those members of the Bench who bring disgrace upon it, and the administration of justice into contempt:—"The extraordinary proceedings described in recent despatches, on the part of the Kansas judge, who was elected to that position by the farmers' organisation, because he was not a lawyer and didn't know any law, appeared to be a natural sequence of the election of an ignoramus to the Bench. His actions would be ludicrous if they were not so serious in their results. The legal aspect of the matter is, that he has defied the Supreme Court of the State of Kansas by setting aside its order in a foreclosure suit. To enforce his own order he has caused the arrest and imprisonment of the receiver of the property for contempt of court in obeying the order of the higher tribunal, and has caused the arrest of the Sheriff for releasing the receiver upon a writ of *habeas corpus* granted by the Supreme Court. He is reported to have refused to give any attention whatever to proceedings for the foreclosure of mortgages, stating, as his reason, that such actions are oppressive to the people. It was proposed at the time of the election of this 'freak,' to send him to a law school before taking his seat on the bench. But the plan was abandoned, and doubtless with reason. It is plain to be seen from his antics that the man not only never knew any law, but that he is incapable of acquiring it. He lacks in a woful degree that common sense which, in a judge, is as necessary as, and often passes for, legal learning. Even a jackass knows better than to try to impede the progress of a locomotive. But this Kansas species doesn't hesitate to antagonise the Supreme Court and public opinion as well. The overthrow of accepted legal procedure and the defiance of acknowledged authority may seem the proper thing to the jaundiced visions of fanatics, but it will hardly commend itself to civilised people. If the organisation which elected this man, and which it is claimed now upholds him, stands for dishonesty in the treatment of creditors and irregularity in the administration of justice, its early dissolution is to be hoped for. As for 'Judge' M'Kay, his career should be cut short by

removal from the position he has disgraced." The people of Manitoba would think it a monstrous thing to be inflicted with such an apology for a man; but we regret to say that there is a judge of a County Court of this province who repeatedly openly defies and burks the acts of our Legislature, and who habitually scoffs at the decisions of the highest Court of this province, and of the highest Courts of the empire, lessening, of course, by such actions the respect of his hearers, but none the less subverting justice and making his court a by-word among those who would gladly shun, but have to frequent it. To such an extent has this been carried that one of the leading counsel in this province, Mr. Howell, Q.C., the other day declared in our hearing at the opening of a trial in the Queen's Bench that "the conduct of the County Court judge at the hearing of the case before him was a reflection on the administration of justice in Manitoba, and a disgraceful proceeding in a court of justice!" It is with great reluctance that we feel called upon to give publicity to these facts, but our duty to the public is plain, and we will not shrink from it; yet at the same time we trust that we shall not be compelled to refer to this subject again, and that the judge will endeavour to restore a feeling of confidence in the procedure of his court, and act more in harmony with the feelings of the profession and the public at large.—*Western Law Times*.

Review.

The Elements of Practical Conveyancing according to the Law of Scotland. By HENRY HILTON BROWN, a Member of the Society of Solicitors of Elginshire. Edinburgh: T. & T. Clark, Law Publishers. 1891.

THIS handbook, though unambitious in its object, should prove very useful. Its genesis is explained by the author:—"The Society of Solicitors of Elginshire, in the beginning of

1890, resolved to make arrangements for a course of lectures on Elementary Law for the benefit of law apprentices and clerks. The course was to be delivered in the winter of 1890-91, and the author was asked to undertake the subject of Conveyancing. . . . The following pages contain the outcome of his deliberation, re-written and re-arranged in the light of a session's experience." It should be of service to law apprentices by making their somewhat dry daily work more intelligible and consequently more interesting. The arrangement is excellent. The general principles of Conveyancing, though, of necessity, laid down broadly and generally, and with great brevity, are nevertheless stated with extreme distinctness. The various deeds dealing with heritable and moveable rights are there treated in order, and their various clauses explained with the same brevity and clearness. The book is not intended to supersede perusal of the standard works, but is well designed to accomplish its purpose. The Final Instructions are by no means the least important part of the work. It may not help a law apprentice much to know that a "Declaratory Adjudication is used when a title has, through error, become mixed, or the descriptions of subjects have been inadvertently transposed;" but the general public must feel hopeful when they hear an "old hand" instructing the law agents of the future as follows:—"If there are two ways open to your client, which are both correct, but one more costly, never advise him to adopt the latter without a sufficient reason;" and again, "Study brevity,—never use two words where one will do, or a phrase for what a word will express."

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

Judicial Appointments.—The London *Law Times* writes : —“ We are rather curious to know why all judicial appointments in Scotland seem to be regulated by political considerations, while in England such considerations are sometimes disregarded. It is said that the supply of Tory lawyers in Scotland has been exhausted, and that the Liberal Unionists will now have a chance.” If this really is said, its being said is hard to explain. The present Government have appointed Lord Wellwood and Lord Kyllachy, both Liberal Unionists, to be judges in the Supreme Court. The newly-appointed Sheriffs of Perthshire and Ross are Liberal Unionists. The Sheriff-Substitutes at Banff, Wigtown, Greenock, and Hamilton belonged to the same section of the party before they were cut off from politics. That is a just share, we should be inclined to think, considering the *ratio* which the number of Liberal Unionists bears to the number of Tories. But we have not made the calculation with precision.



Those Lawyers Again !—We fear that the *Scotsman* of 17th November last has further prejudiced the legal profession in the minds of the public. In describing a case of suicide

which occurred some days previously, it gratuitously stated that the unfortunate gentleman killed himself "by jumping over the *barristers*, and alighting on his head!"

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A Notable Figure.—By the death on 8th November of Mr. William Gardiner, principal robe-keeper to the Faculty of Advocates, a notable figure has been removed from the Parliament House in Edinburgh, and the Scottish Bar has lost a valuable servant. Mr. Gardiner held his post for the extended period of fifty-five years. While more than half a century of lawyers came and went, began their careers and ended them, he remained steadily at his daily routine. Jeffrey and Cockburn, Hope, M'Neill, Inglis, Moncreiff—all found him quietly waiting for them in the robing-room in those distant mornings, just as did almost the latest intrant to the Faculty. Wigs and gowns were his department, and not the administration of the law. But he took a lively interest in all that pertained to the Faculty and to every one of its members. He had a good deal of dry humour in his composition, and held his own shrewd opinion of each of the counsel whom he deferentially assisted to adorn themselves each morning. There were few idiosyncracies which Gardiner failed to mark, and slyly hint at when opportunity arose. Some years ago the Faculty of Advocates presented him with a testimonial in recognition of his completion of a term of fifty years in their service. In his "stretched-out life" he saw great changes in almost every direction, and when he came to die himself he had long outlived the Parliament House of his youth.

Special Articles.

CARRIAGE AND CONVEYANCE.

WE are familiar in the nomenclature of the road with the distinction between a carriage and a conveyance, and the terms at once suggest very different ideas. To speak of a carriage calls up the man of means who keeps his own coachman, and is weighed down by the ailments of his own

horses; but when we are told of a conveyance, there rises a confused vision of the various "machines" that transport the itinerant bagman from one hostelry to another. A conveyance is anything that conveys; a carriage cannot be exactly defined, but we know that it is something finer than a conveyance. We may discard at once the sense in which the word is used in connection with the ascent of St. Paul and his companions to Jerusalem. The popular use of these interesting terms is curiously illustrative of legal disquisitions on an important department of Railway Law. The Legislature in 1845 authorised railway companies to "carry or convey." What is carrying and what is conveying has not yet been made quite clear; it would seem that the Scottish and English Courts do not see eye to eye in regard to it, and it may be questioned whether an absolute distinction can be drawn. It may not be unprofitable to focus what light can be gathered upon this subject from the leading cases in which the distinction has been canvassed, although there can be no doubt that the new wine of Railway Extension puts a severe strain on the old bottles of the contract of carriage.

We start with the responsibility imposed, upon the one hand, on common carriers by the policy of the edict *nautæ caupones* as adopted in Scotland, or the custom of the realm in England, and with the fact, upon the other, that railway companies were originally formed, if the root-idea is regarded, to make a road, and profit out of it. Their proper remuneration was in the form of tolls: to become carriers was permissive, and in their own power. So far it is simple, but an ordinary carrier is only bound to carry according to his profession, while very exceptional obligations have been imposed upon railway companies. In practice, complication arises from the variety of things now conveyed or carried. Passengers, live stock—including lions—passengers' luggage, and ordinary goods do not all stand upon the same footing. In ascertaining the precise legal relations of the transit of merchandise or live stock many elements may be involved, including the risk undertaken, the ownership of the waggon, the terminal services performed, the modifications of a special contract.

The duty of a common carrier may be summarised as being

to carry safely, to carry expeditiously, and to carry for a reasonable rate. We shall not embark upon the question of rates *versus* tolls further than as the distinction may illustrate the lines that divide carriage from conveyance. The two alternative phases of a railway company's business are found contrastedly, though not exclusively, provided for in sections 79 and 85 of the Railways Clauses Act of 1845. The power given to become carriers is permissive, and is found in section 79 supplemented by section 82, which expressly entitles to all the privileges of common carriers. The company are authorised to employ engines or other locomotive power, and carriages and waggons to be propelled thereby, and to carry and convey upon the railway all such passengers and goods as may be offered to them, and to make reasonable charges not exceeding the tolls authorised by the general public statute and by their special Act. "Toll," which "is a word of varying meaning," sometimes importing tolls proper only, and sometimes including charges for carriage, is here, as in the interpretation clause, used in the more comprehensive sense. In both cases it is found in conjunction with the word "convey." It is used again in section 84 in conjunction with "conveyance," in reference to calculation by mileage, and in section 85 it is contrasted with "charge for the carriage of passengers and goods," and is therefore used in the restricted sense. Section 85 confers upon "all companies and persons" the right to "use the railway with engines and carriages properly constructed," and it would appear that the sections which follow down to and including the 94th all refer to tolls in respect of transit on the road, and not to charges for carriage proper (*H. R. v. Jackson*, 3 R. 850. *Sc. N. E. R. C. v. Anderson*, 1 M. 1056. *cf. Brown v. G. W. R.*, L. R. 9, Q. B. D. 744). It is also remarkable that the provisions dealing with regulations relating to the use of the railway, and the detailed conditions as to engines and carriages, are mainly concerned with matters incidental to the presence on the line of independent vehicles, or, at any rate, of foreign plant.

Section 79 of the Act of 1845 makes reference to the special Act of the company as well as to the public statute. Clauses of a special Act which deal with these matters

are broadly divisible into the "toll clauses" proper, and the "limiting charges" clauses. Take, for example, the Caledonian and Scottish North-Eastern Amalgamation Act of 1866.

Power is given, in the first place (sec. 34), "to demand or take in respect of the use of the railways . . . and for the use of carriages thereon any tolls not exceeding" certain specified sums—"in respect of passengers, animals, articles, matters, and things conveyed upon the railway." An additional charge is authorised, in the second place, in each case (sec. 34) "if conveyed in or upon any carriage belonging to or provided by the company."

A separate toll is sanctioned (sec. 35) "for the use of engines for propelling carriages upon the railway" in addition to the several other tolls or sums authorised.

There follow a short-distance clause and a small-parcels clause, and then come the limiting charges clauses, one (sec. 38) dealing with maximum rates for passengers, and the other (sec. 39) with the same for animals and goods. The latter runs thus:—"The maximum rate of charge to be made by the company for the conveyance of animals and goods on the said railways, including the tolls for the use of the said railways, and for waggons or trucks and locomotive power, and for every other expense incidental to the conveyance (except a reasonable charge for loading and unloading goods at any terminal station in respect of such goods, and for delivery and collection, and any other service incidental to the business or duty of a carrier, where any such service is performed by the company), shall not exceed the following sums," etc. The clause relating to passengers is similar, but stops at the word conveyance. It is evident that the goods clause at once raises a broad distinction between what is "incidental to conveyance" and is not to be paid for, otherwise than in the maximum charge, and what is "incidental to 'carriage,'" and is to be paid for *extra*. Let us see what the limitation means. In the case of passengers the mileage toll for use is 2d., for carriage 1d., and for locomotive power 1d.; in that of horses or cattle, 2d., 2d., and 1d. respectively; and in that of coal (per ton), 1½d., 1d., and 1d. The maximum rate under the limiting clauses is for a first-class passenger 2d.,

and for a third-class passenger 1d.; for horses, at owner's risk, 3d., and at company's risk 4d.; for cattle, 1d. when conveyed in truck loads, and for coal conveyed a distance of over nine miles 1½d. for the first nine, and 1¼d. for every additional mile.

The question has been raised whether the limiting charges clause of such an Act applies to traffic conveyed otherwise than as a carrier, or only to charges for actual carriage. In the same case the Railway Commissioners, acting under the Act of 1873, "had no hesitation in saying" that it did; the First Division of the Court of Session (Lord Deas refusing even to indicate any opinion) intimated their view that it did not (*Aberdeen Commercial Co., etc., v. G. N. S. R.*, 3 N. & M. 205 and 6 R. 67). The views of the Scottish Court in this case as to what constitutes carriage can scarcely be harmonised with the reasoning of the Queen's Bench Division in the important case of *Hall v. L. B. & S. C. R. C.* (L. R. 15, Q. B. D. 505). The Scotch case was a reference from the Railway Commissioners, which was very awkwardly stated, but it elicited a very distinct declaration from the Court as to what in their view was acting as carriers. The English case, also a reference from the Commissioners, resulted in an equally emphatic affirmation as to what are terminal services incidental to carriage as opposed to conveyance. It is important to observe that the limiting charges clause in the special Act considered in the Aberdeen case formed part of an old Act, and did not contain the portion in brackets relative to terminals; while in Hall's case, the clause was almost exactly the same as the one we have taken as our illustration. It is significant that the Scottish judges had not under their eyes the contrast which appears within the four corners of the clause in the latter case.

The circumstances of the Aberdeen case were these. The Company's Act was an old one, and its tolls for the transport of manure had been framed before expensive artificial manures requiring protection in transit had come into general use. The company were dissatisfied with the remuneration provided under their limiting charges clause, for this branch of traffic which had largely expanded, and proceeded, on the assumption that it was applicable to carrier's charges only, to discard it

and fall back on the tolls provided by their toll clauses proper, maintaining that they were entitled to charge as toll-takers anything within the sum total of the three elements for which toll might be taken. Having previously carried the traffic in question upon consignment notes at station to station rates, they issued a notice that they "did not profess to act, and did not act as carriers" of the articles comprising it, but that they would on request, on certain conditions and at agreed rates (but not otherwise), provide waggons or locomotive power, or both, to persons desiring the use of their railways for the purpose of allowing them to forward such traffic. Consignment notes were discontinued, and "requisition notes for the use of plant" substituted for them. It was stated on the schedule to these notes that one-half of the charge was for the use of waggons and locomotive power, and the other half for the use of the railway. Two large manure companies subscribed these notes under protest, and applied to the Railway Commissioners under the Railway and Canal Traffic Act, maintaining that the notice was invalid, and that the company could only charge under the limiting charges clauses of their Acts, under the circumstances "under which the goods were carried or conveyed upon their railways." As matter of fact, it appeared that the waggons were handed over to the applicants at Aberdeen station, removed by them to their premises, and there loaded and returned by them to the company at their goods station. The company supplied locomotive power for conveyance to the station of discharge, where the contents were removed in the company's sidings, by the local agents of the applicants or their customers. The waggons in transit, it appeared, formed a part of the ordinary trains of the company. The Railway Commissioners held that as matter of fact the company did carry and convey the goods in question, that they could only charge under their limiting charges clause, and that the limiting charges clause was also a toll clause. They regarded their action as a refusal of reasonable facilities. The judges of the First Division, upon the case stated to them, regarded the company's action as imposing an unreasonable prejudice or disadvantage on a particular class of traffic; declined to agree in holding that the limiting clause applied

to them as toll-takers, because they thought it "not a toll clause, but a clause regulating the charges for carriage;" and decided that "what the company did in point of fact, and for which they claim to be remunerated, was neither more or less than acting as carriers of these goods." The Lord President laid stress on the fact that the waggons conveying them formed part of composite goods trains, in which there were waggons belonging to other traders of which the company acted as carriers, and considered the loading or unloading immaterial, as it was common in the ordinary course of railway traffic that that should be done by the trader. The Lord President took a distinction between the separate toll for the use of an engine, and the charge for locomotive power included in the limiting clause, observing with due disregard of the rubric that the former was not a charge for the furnishing of propelling power, but for the exclusive use of an engine, while the charge for locomotive power was "a charge that may be made for that use of an engine which every truck in a long train has in common with all the other trucks." The criterion in his view was found in whether the conduct of the train was in the hands of the trader himself or in that of the company, and here he considered the company just did the specific things contemplated by the Legislature in section 79 of the Railways Clauses Act, which authorised them to carry. No suggestion seems to have been canvassed as to the liability incurred by the company in respect of the traffic in question, and the view indicated would practically read out of section 79 the alternative words "*or convey*." It was said, no doubt, that the word tolls in that section really means charges for carriage. It might perhaps with equal truth be suggested that it there covers both charges for carriage and tolls proper.

The reasoning of the English Court in the case of *Hall* would seem to add a third alternative, and also to support the view of the Commissioners as to the limiting charges clause covering tolls proper. The clause under examination was similar to the one in the Caledonian Act, but also specified covering among the terminal services. The question was as to what was included in expenses incidental to conveyance covered by the mileage rate, and services in-

cidental to the duty or business of a carrier to be separately charged for under the provision for terminals. The Queen's Bench Division held that station accommodation, the use of sidings, weighing, checking, watching, clerkage, and labelling, provided and performed by the company in respect of goods traffic carried by them as carriers, may be, and *prima facie* are, services incidental to the duty and business of a carrier, and if found to be so in fact by the Commissioners in any particular case, are properly the subject of a separate charge. The applicants in the case were lime, cement, and coal merchants. Mr. Justice Wills laid stress on the fact that the notion of the railway being a highway for the common use of the public was the starting-point of English railway legislation, deeply engrained in it, and essential to a proper understanding of its provisions. Three states of things, he observed, were from this point of view to be expected, and to be provided for by legislation. The first would be the company being merely owners of a highway, and toll-takers for its use by other people with their own engines and carriages. The second state of things was not only conceivable, but in operation for many years. "The company provided the line, and provided the engines and trucks, but they were not carriers." The large warehouses for reception, the necessary staff, the loading and other multitudinous services were provided and performed by an independent carrier, such as Pickford & Company. The third state was where the company themselves acted as carriers. Mr. Justice Wills described these three states as (1) toll-takers, and neither conveyers nor carriers; (2) conveyers, but not carriers; (3) carriers. It would naturally be expected, he said, that in the first case they would have power to take tolls, and tolls only (for use of road); that in the second they would have power to make charges, including tolls and charges for the use of rolling stock, and it would be reasonable, as they had greater facilities for keeping and employing rolling stock than others, that where they provided both trucks and locomotives the maximum charge should be lower than the aggregate of the three separate ones. This reasoning would seem to lead necessarily to the view that the limiting charges clause is also a toll clause. But the learned judge con-

tinued:—"It would seem natural also to expect that where the company were carriers, inasmuch as they performed the identical services which they perform under the second head, and others besides, they should be allowed to charge the same sums as they might charge when falling under the second category plus those which are appropriate to the extra services and liabilities which fall upon them when they undertake the duties and business of a carrier. It seems to us that this is precisely what has been done by the clauses under consideration." And he pointed out that the charges of and incidental to conveyance, as that phrase had been explained, were properly measured by the mile of distance travelled over, while the terminal carrier's services had no common measure with the distance run. One result of the case was to confirm the opinion of Hatherley, V. C., in the *Midland Railway Company v. The Ambergate Railway Company* (10 Hare 359), that the public right to use the road does not include the power to use stations.

The *species facti* to which the English judges apply the term convey, seem practically indistinguishable from those which the Scottish Court held to import the relation of carriers. That a middleman carrier is interposed between the owner and the railway company appears of no importance, and the English Court threw overboard as a criterion "the ordinary conduct of trains in the ordinary course of the traffic." No doubt in the Aberdeen case the same practical result could have been reached by acceptance of both branches of the English doctrine, which appears to be in conformity with all the provisions of the general and of the ordinary special Acts. It gives full effect to the whole words of the statute and alternatives of fact, for it is reasonable enough to suppose that the Legislature intended to say, You may carry, or at all events convey, and you may take tolls, which, as the occasion requires, are to be either tolls proper or charges for carriage, including terminals.

It would really appear that Parliament in framing clause 79 in 1845 had just two states of fact in view: conveyance by the railway company as owners of plant upon their own road; and second, carriage by them with all the liabilities and privileges of common carriers. Apparent complications have, however,

been introduced by the provisions of the Railway and Canal Traffic Act of 1854. At common law a carrier is only bound to carry according to his profession; it is optional to carry or not to carry any particular goods or animal (*Johnson v. M. R. Co.*, L. R. 4 Ex. 367; *In re Oxlade v. N. E. R.*, 15 C. B. N. S. 680). But the Act of 1854 has imposed the special obligation upon all railway companies of affording according to their respective powers "all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles" (17 & 18 Vict. c. 31, sec. 2). It has defined traffic as including "not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company." The phraseology used appears to be in perfect conformity with that of the Act of 1845, and with the doctrine of *Hall's* case. It simply imposes an obligation to facilitate conveyance, and unless this is to be read into the words, "reception, forwarding, and delivery," two of which are intimately associated with carrier's business, would seem to leave it open whether this is to be done as a carrier. . Section 7, which provides for special contracts embodying just and reasonable conditions, and applies the policy of the Carrier's Act of 1830, limiting liability where value is not declared, to the transport of live stock, requires that the special contract should be signed by the owner or person "delivering for carriage." It has been held that under that statute a railway company is compelled to "carry." But the word "carry" has been explained to be open to construction; it does not mean carry as a common carrier, and may be assimilated to convey. In *Dickson v. G. N. R.* (18 Q. B. D. 176), a company had given notice "that they were not, and would not be, common carriers of dogs, nor would they receive dogs for conveyance except upon terms" which were held to impart an unreasonable condition under section 7 of the Act of 1854. It was held that although the company were not bound to be common carriers of dogs, yet that being bound by the Act of 1854 to afford reasonable

facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions. The judges laid down that they were "bound by statute to afford reasonable facilities for carrying, among other animals, dogs;" that they were bound, subject to the declaration as to reasonable conditions, "to carry dogs for hire, but not as common carriers," and that "their liability was that of ordinary bailees for reward." "The duty," said Mr. Justice Lindley, "thus imposed on railway companies is inconsistent with their right to refuse to carry any particular class of goods or animals which they have facilities for carrying." Probably in the case of a dog the carrier's services of delivery would be performed, but many cases can be figured in which the facts would present rather the conveying of Mr. Justice Wills than the carrying of Lord Esher and Mr. Justice Lindley. The Legislature, we have seen, is very careful to use the more comprehensive term.

A Scottish case relating to the transport of cattle (*Rain v. G. & S. W. R.*, 7 M. 739) exhibits an instance of this, and presents a view of the relations more in accord with the doctrines of *Hall's* case than with the reasoning in that of the Aberdeen Commercial Company. Certain cattle were forwarded by rail to a consignee at Norwich. Two of them died from overcrowding. The pursuer bespoke a truck of certain dimensions the day before, was present at the loading, and in spite of observation by the stationmaster, sent more cattle in it than it was intended to hold. The invoice bore certain "conditions of carriage" connected with a reduced rate. The Lord President, in giving judgment, observed that the contract between the parties was not in any view of it an ordinary contract for carriage; that the duty undertaken by the company consisted in this, and this only, to convey the waggon with the cattle upon their own line as far as it goes, and then to transfer it to the rails of the next conterminous company. "The pursuer," he said, "hired from the company a waggon for a special purpose, and having loaded it himself, he seems to me to have been very much in the same position as if the waggon had been his own property, which, I believe, is frequently the case with many extensive traders who possess or hire railway waggons for their own purposes exclusively. But when a man superintends the

loading of a truck which is his own property, and requires the railway company to take charge of and deliver, not the goods themselves, but the waggon in which they are contained, there is, I think, an entirely different relation constituted between the parties from that which ordinarily exists between the sender and the carrier in the conveyance of goods." The important feature in the case of *Rain* was the chartering of a particular truck, and the independent loading. In a later case (*Paxton v. N. B. R.*, 9 M. 50), the Lord Justice-Clerk Moncreiff clearly stated the ordinary rule of liability in the carriage of live stock thus:—"I do not think that in the carriage of live animals a railway company are insurers to the extent, that if the animal die in the course of transit, the value or loss must fall upon them." Distinguishing *Rain's* case, he proceeded:—"As a general rule, if carriers, whether by sea or land, whether by railway or on board ship, receive animals for the purpose of transit, they do undertake that they will take due and reasonable care that the animals shall be safely conveyed, and they have the responsibility, and I think they alone have the power, of taking the necessary means to enable that transit to be safely performed." Injuries arising from the "inherent vice" of the animal conveyed, whether that be the horse-dealer's vice or merely highly strung nerves, or from any natural or wholly unusual or unexpected cause that could not have been foreseen, are not proper grounds of liability. This does not seem to import that the company are not common carriers of animals if they hold themselves out as such, and English judges have declared that the ancient recognised exception "the act of God" is a mere short way of expressing the same proposition.

In the case of passengers, the obligation is to take due and reasonable care, and the liability is for negligence. It may be questioned whether any distinction can be drawn between the conveyance and the carriage of a passenger who walks into the train at one end of a journey and out of it at the other. There are, of course, no terminals on passenger traffic; and, as Mr. Justice Wills observed in *Hall's* case, "passengers are not collected, delivered, covered, loaded, weighed, checked, nor in railway phraseology 'handled,' as goods are." To reason from the one class of traffic to the other is often fallacious. Passengers' luggage, however, stands in a different

position. The ordinary liability is the same as that in the case of goods, modified only so far as luggage taken by the passenger with him in a compartment is concerned, "to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which are lost their (i.e. the company's) contract as insurers, does not apply to loss occasioned by the passenger's own default" (Lord Halsbury in *G. W. R. v. Bunch*, L. R. 13 App. Ca. 31). Lord Watson states the same view, perhaps with greater accuracy thus:—"I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit to which the act or default of the passenger has been contributory" (13 App. Ca. p. 48).

What are the rights, duties, and liabilities of a company in reference to traffic conveyed upon their line in vehicles not their own, and to the waggons in which it is transported? They cannot be compelled by injunction to work the signals for independent trains endeavouring to use their line under the general public right, which is thus practically rendered valueless. (*Powell Duffryn Steam Coal Co. v. Taff Vale R. C.*, L. R. 9 Ch. App. 331.) Where "running powers" exist, it is, of course, different. They are entitled to enforce the conditions as to engines and carriages using their railway contained in the Railway Clauses Act of 1845 (*M. R. v. Ambergate, etc., R. C.* 10 Hare 359). It is their duty to make a general inspection of vehicles coming upon their line, and satisfy themselves that they are in a safe state; but a minute examination would defeat the purposes of through traffic, and therefore cannot be required (*Richardson v. S. E. R.*, L. R. 1 C. P. D. 342). Two Scottish cases have clearly indicated the nature of their responsibility for accidents caused by the breakdown of foreign plant. In *Watson v. N. B. R.* (3 R. 637), a coalmaster sued on account of damage done to his waggons. He was in the habit of sending his coal along the defenders' line in his own waggons. On one occasion a coupling between the foremost waggon and the engine broke, the defenders' servants re-attached the waggon by the side-chains, but a few miles farther on the waggon again

broke loose and was overturned, and several others behind it also injured. In the circumstances it was held that the defenders were in fault, but the general rule as to their responsibility in such cases was clearly laid down. The Lord President said:—"I concur with Lord Deas in holding that the liability of the defenders rests on different grounds from the liability of common carriers in the carriage of goods, and that there is also an important distinction between the present case and that of injury to passengers." He pointed out that the train consisted of the plant of both parties, and there was no presumption if it broke down that it was the fault of the company as in the case of passengers. "Therefore, I think," he said, "that in the contract of haulage, where the injury is occasioned by a breakdown of the plant, the burden of proving fault is distinctly on the person who alleges it." The duty of the defenders was laid down as being to use all reasonable care and diligence for the protection of the waggons entrusted to them. Is there any difference in principle between "the contract of haulage" and Mr. Justice Wills' "conveyance"? In the later case (*Barr & Sons v. C. R.*, 18 R. 139) the accident was due to a latent defect in the waggon of another trader in the same train. The waggons were being returned empty when it occurred. It was the practice of the company to convey coal from the colliery to a port in the trader's waggons, and to take the waggons back, the sole charge being a rate of 1s. 7½d. per ton, while the rate for the conveyance of coal in the company's waggons was 2s. There was no negligence on the part of the defenders, and the claim was rested entirely on the ground that they were liable as common carriers. It was held that they were not liable for safe delivery as under a contract of carriage. The Lord President pointed out that if in any view there had been a contract of carriage it was completed when the coals were delivered, and that the conveying back of the waggons was the performance of an incidental obligation of the particular contract (a mixed and innominate contract), and not part of the common law obligation of a common carrier, or of his obligation under the edict. Lord Adam expressed an opinion that where waggons are admitted and used on a railway, only subject to statutory regulation, the common law lia-

bility of carriers with respect to them is necessarily excluded. He indicated the view that, in regard also to the coals transported in the waggons, the contract was one of haulage and not of carriage, considering that two elements essential to fix liability on the company as common carriers, an entire responsibility for the soundness of the carriage and for the packing of the goods, were absent. Lord M'Laren, on the other hand, considered the company responsible for the coals as under a contract of carriage, and for the waggons as under a contract of location, reaching this conclusion by an ingenious analysis of the contract, and assimilating the obligations as to the waggons to those under location, because he considered the reduction of rate equivalent to hire of the waggons. "The waggons," he observed, "were not being carried, but were being used as part of the apparatus for the carriage of goods over the company's line. This is quite different from the case of a railway carriage or waggon received by a railway company for delivery at a distinct place, and for which freight is paid." The case thus suggested has occurred in England. In *Johnson v. N. E. R. C.* (November 14, 1888, 5, *Times*, L. R. 68), the facts were these. The plaintiff wished to send a locomotive engine of his own from Yorkshire to Wigan. The railway company had three modes of conveying such an engine. The first and most expensive was to place it on a truck and carry it by goods train; the second, to send it on its own wheels and under its own steam like a pilot engine; and the third, and least expensive, to take it on its own wheels like a truck in a goods train. It was agreed to adopt the second mode; the engine was inspected by the defenders, and sent under charge of one of their drivers and firemen over their line. After travelling ten miles it broke down, owing to a bolt giving way. The defenders required the plaintiff either to repair the engine so as to enable it to continue its journey or pay the increased cost of sending it on upon a truck. The plaintiff refused, maintaining that the defenders were bound to carry or convey the engine to Wigan, and sued for recovery of the engine, and damages for its detention. Mr. Justice Bowen took the view that even if the company were common carriers of the engine, they were not subject to the risk of inherent defects unless they had specially contracted to that effect, and that there

was no such agreement. The Master of the Rolls said that the engine was not delivered by the plaintiff to the defendants as common carriers, to be carried by them in the ordinary way. There was a specific contract that it should be carried on its own wheels under steam. To all contracts of carriage there was an implied exception where it was clearly reasonable and right, as, for example, if the engine should blow up, and he held that there was such an exception in this case. The Lord Chancellor took a different view upon the construction of the letters constituting what he called the contract of carriage, and considered that the defendants were bound to deliver the engine at the termination of their own line. It would seem that though in this case there could not be said to be a contract of haulage, yet the obligation undertaken assimilated rather to that than to an ordinary contract of carriage, and was really rightly described as a contract of conveyance. As has been already indicated, it has been decided that the lien given over carriages and goods by sec. 90 of the Act of 1845 (sec. 97 of the English Act) for the payment of tolls exists only in respect of tolls proper, and not of charges for goods (*H. R. v. Jackson*, 3 R. 850, and *Wallis v. L. & S. W. R.*, L. R. 5 Ex. 62). It has been held that waggons, the property of a waggon company, in which coal belonging to certain coalowners was conveyed, could not be detained and sold for default of payment of tolls due in respect of the coals (*M. S. & L. R. C. v. North Central Waggon Co.*, L. R. 13, App. Ca. 554).

It would therefore seem that there are four gradations of relation in which a railway company may find itself in the transport of merchandise:—

1. It may be merely a toll-taker for the use of its road.
2. It may convey, supplying locomotive power, or both locomotive power and carriages.
3. It may act as a carrier, performing carrier's services under the Act of 1854, but refusing to accept the liabilities of common carriers.
4. It may be a common carrier.

The criterion for deciding between the last two alternatives must be found in the conditions of the particular contract, and the action of the company as to how it holds itself forth

to the public. The test as between the second and third is one mainly of matter of fact, and the question must be solved by an examination of the services rendered. The only definite test of fact will probably be found in the performance of some terminal service irrespective of the power to charge for it. For practical purposes the distinction may often be immaterial, as facilities for transport must be afforded in either case, and probably the liability is the same, except that the moment when it is discharged may be different. It is, however, important in principle. In mineral traffic it is frequently, if not generally, the case that "nothing is done but conveying" (*cf. Gidlow v. L. & Y. R. C.*, L. R. 7, E. & I. App. 517), and services incidental to conveyance require to be clearly described and declared. In one sense carriage—"or carrierage"—includes more than conveyance, the incurring of a further obligation, and the provision of some further convenience. But in another it is included in conveyance, which is the more comprehensive term. There cannot be carriage (by the same agent) without conveyance, and to convey is an essential part of the process in performing the contract of carriage. While companies may both *carry and convey*, the Legislature has wisely provided for either alternative relation by authorising them to *carry or convey*, and as wisely specified the character of the facilities it has enjoined them to afford, irrespective of either term, in later traffic legislation. J. F.

THE PRESUMPTION OF LIFE.

STATISTICS tell us that the average length of human life has increased in this country, and is increasing. Judging from newspaper paragraphs, too, notable cases of longevity are not less common than formerly, nonagenarians and centenarians, with their remote reminiscences, being by no means rare. At first sight, therefore, it may seem inconsistent that the law of the land, in so far as it has interfered at all, should have shortened, and not lengthened, its presumption of life. Bankton (ii. 668) lays it down that "one is presumed to live till he would have arrived at the age of one hundred years." Until the time at which he would have reached that age, it was

necessary to prove his death; after that time, the presumption shifted, and it was incumbent on those alleging it to prove that he was still alive. As the law stands to-day the presumption is not so sanguine, and does not extend to so venerable an age. Seven years after a person was last heard of are all that the law allows him to live. On a nearer view, however, it is apparent that in this the law is not running counter to the teaching of statistics at all. Nor is it merely animated by an insular belief in the superior healthiness and safety of our own land, as compared with foreign regions to which the absentees have gone. It is really progressive in this matter; for the provision is merely a recognition of the enormous advance which has been made in the means of communication in recent times. The dangers of travel have at the same time been reduced to a minimum. Well might they in Bankton's time be slow to conclude that a man who had "gone abroad to far distant countries" was dead, merely on the ground that he had not been heard of for many years. Voyages then were long at best, and perilous in the extreme; ships were crazy and comparatively few. The risks on land were scarcely less, and journeys there only less tedious. It would have been unreasonable to presume an absentee dead. Robinson Crusoes and Enoch Ardens were more than possibilities. They were realities. Nowadays it is widely different. With steam, and electricity reduced to use in a hundred ways, and with our geographical knowledge vastly extended, the likelihood is the other way. It is extremely improbable that any one will continue alive and be unheard of for many years; and accordingly the presumption, in such circumstances, reasonably is that he is dead.

Bankton's statement of the position of the law is perhaps misleading. The Courts were slow to presume death; and, even at a date when the individual in question would have attained a very ripe age, they still declined to find it proved or presumed that he had died. At the same time, however, it cannot accurately be said that any rigid limit of age was ever fixed, up to which life was to be presumed, and past which there was the contrary presumption. The position of the common law of Scotland in this matter is more accurately stated by Lord Justice-Clerk Hope in the case of *Fife v. Fife*, 1855

(17 D. 951). His lordship said:—"We have, fortunately, no rule founded on presumptions derived *from the lapse of any fixed period of time*, and every case which I have ever seen shows how unwise it would be to attach any such weight merely to the lapse of a certain number of years, without regard to the age and character of the party and his condition in life, and the character of the country in which he was last resident." The decision was always based on the circumstances of the particular case, as a perusal of the numerous decisions on this point in the reports will show (Dickson on "Evidence," secs. 117 *et seq.*), although the decisions disclose a sanguine view of the duration of human life.

The circumstances in which difficulties arise in determining the time at which a person died may be divided into two classes:—(1) It may be necessary to determine which was the survivor of two persons who perished by the same calamity, such as shipwreck, suffocation in case of fire, or in battle, etc. This class of questions is commonly referred to under the head of Presumption of Survivorship. Rules were laid down in the Civil Law as to the presumption in such cases. Thus, where two persons above the age of puberty perished by the same accident, the younger was presumed to have survived the elder; whereas, if one of them was below the age of puberty, he was presumed to have died first (*Dig. xxxiv. 5, secs. 9, 22, 23*). In the Civil Code of France (the Code Napoleon) similar arbitrary presumptions are to be found (secs. 720–722). But it cannot be said that in Scots Law any such special presumptions would be followed. The ordinary rule which lays the *onus* of proving survivance on the party maintaining it would more probably be followed by the Courts (*Bell's Dictionary, voce Presumption of Survivorship*; M'Laren on "Wills and Succession," secs. 117 *et seq.*).

(2) It may be necessary to ascertain whether a person absent from the country, or missing, is still alive, or that he was alive at any particular time. The cases bearing on this point are very numerous. It was to remove hardship in connection therewith that the Presumption of Life Limitation (Scotland) Act, 1881 (44 & 45 Vict. c. 47), was passed. It proceeded on the preamble—"Whereas great hardships have arisen from the want of any limitation to the presumption of

life, as regards persons who have been absent from Scotland, or have disappeared for long periods of years." The statute enacted (sec. 8) that, "for the purposes of the Act, in all cases where a person has left Scotland or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his being last heard off, at or after such leaving or disappearing."

It is not necessary to narrate the various provisions of the Act of 1881. The measure was an attempt to remove what must be regarded as hardships. After it came into force, defects were, of course, disclosed. The Act of 1881 has accordingly been repealed by the Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. c. 29), which leaves the law in a much more satisfactory position.

By section 3 of the Act of the present year, when any person has disappeared, and has not been heard of for seven years or upwards, the Court on the petition (1) of any person entitled to succeed to any estate on the death of such person, or (2) of any person entitled to any estate, the transmission of which to the petitioner depends on the death of such person, or (3) of the fiar of any estate burdened with a liferent in favour of such person (*School Board of Peterhead v. Yule's Tr.*, 10 R. 763), may, after such inquiry as the Court may direct, find that such person has disappeared, and find what was the date on which he was last known to be alive; and find in the facts proved or admitted that he died at some specified date within seven years after the date in which he was last known to be alive. Where there is no sufficient evidence that he died at any definite date, the Court may find that he shall be presumed to have died exactly seven years after the date on which he was last known to be alive. Thereupon any of the persons above specified may make up titles to, enter into possession of, sell or dispose of, or burden such estate as if the absentee had actually died at the date on which the Court has found that he is proved or presumed to have died. This applies to the intestate moveable succession only of a person who was a domiciled Scotsman at the date of his proved or presumed

death. The right of the absentee to recover the estate is barred after thirteen years (sec. 7). Power is given to dispense with the consent of an absent person to the sale of property held *pro indiviso* (sec. 4). The next heir to an absentee heir of entail in possession may have a *factor loco absentis* appointed, and the estate disentailed and sold, the values of the next heir's interests being ascertained and paid or secured, the period of absence being reduced from fourteen years to seven (sec. 8). The Act does not apply to a policy of insurance (sec. 11). The competent Court is one of the Lords Ordinary of the Court of Session; but the Sheriff Court is also competent where the amount involved does not exceed £500 (sec. 12).

A TRIAL FOR SEDITION.

THE year 1793 seems to have been fruitful of trials for seditious practices in Scotland. We have before us an interesting volume, containing "An Account of the Trial of Thomas Muir, Esq., younger of Huntershill, before the High Court of Justiciary at Edinburgh, on 30th and 31st August 1793;" and "An Account of the Trial of the Rev. Thomas Fyshe Palmer before the Circuit Court of Justiciary, held at Perth on the 12th and 13th September 1793, on an Indictment for Seditious Practices." A perusal of this curious publication may well give us pause. If the law with regard to sedition in Scotland is now in the same condition as it was one hundred years ago, we live in a "perilous state." There is not a single candidate for parliamentary honours—Whig, Tory, Unionist, or Gladstonian—who is not within measurable distance of penal servitude after each of his public speeches. The enjoyable locality of Peterhead, not the serene atmosphere of St. Stephen's, would be his brief dooming if a modern Lord Henderland, Swinton, Dunsinnan, or Abercromby had the trying of him.

Thomas Muir, Esq., advocate, younger of Huntershill, seems to have been an ardent reformer. As is the case with many of these zealous and well-meaning gentlemen, it may have been that his zeal was swifter than his discretion; and an examination of his trial—at which he conducted his own

defence—seems to establish the fact that, also after the fashion of many reformers, he was exceedingly fond of the sound of his own voice. The gravamen of the terrible charge against him is thus set forth in the indictment:—"In so far as on the 3rd day of November 1792, or on one or other," etc., "the said Thomas Muir having been present at a meeting in the town of Kirkintilloch, . . . denominated 'A Society of Reform,' or bearing some such name, . . . he did, with wicked and seditious intention, address and harangue the said meeting; in which speeches and harangues the said Thomas Muir did seditiously endeavour to represent the Government of this country as oppressive and tyrannical, and the legislative body of the State as venal and corrupt, particularly by instituting a comparison between the pretended existing Government of France and the Constitution of Great Britain, with respect to the expenses necessary for carrying on the functions of government; he endeavoured to vilify the monarchical part of the Constitution, and to represent it as useless, cumbersome, and expensive" . . . And these, according to the major proposition, are crimes of an heinous nature, and severely punishable! Well may we ask with Shylock, "Is that the law?" In the name of God, the people, and free fishing, which of us is safe?

But then this precious document goes on to particularise the heinousness of the younger of Huntershill's offence. It appears that not only did this dastardly villain venture to suggest that the Government of this country was not all that it should be, that the legislative body was but human, and the monarchy expensive, but he actually had the temerity, wickedly and feloniously to exhort and advise several persons to purchase and peruse various pamphlets and writings, particularly Paine's *Rights of Man*, from whose dread pages the following extracts amongst others are given:—

"Of more worth is one honest man to society and in the sight of God than all the crowned ruffians that ever lived."

Really, Mr. Muir!

"Rouse then, ye Britons! Awake from the slumbering state of apathy in which you have suffered yourselves ingloriously to remain. Open your eyes to the injuries which have been heaped upon you; and assert your right to have

them redressed. Evince to all the world that you are the true descendants and sons of your once famed glorious ancestors; prove yourselves worthy to inherit, in its highest degree of perfection, that Constitution which they raised by their valour and cemented with their blood!"

Truly a seditious rogue this!

"*Priests*: 'God ordains peace: Religion prescribes obedience.'

"*People*: 'Peace presupposes Justice: Obedience has a right to know the law it bows to.'

"*Priests*: 'Man is only born into this world to suffer.'

"*People*: 'Do you then set us the example.'

"*Priests*: 'Will you live without gods and without kings?'

"*People*: 'We will live without tyrants, without impostors.'"

Oh, away with him!

To this indictment Mr. Muir pleaded not guilty, and was then asked if he had any objection to the relevancy of the charge contained in it. This somewhat illogical inversion of the scientific order of procedure seems to have been the custom in those days. But Mr. Muir had a soul above relevancy. "Mr. Muir replied," says the chronicler, "that he had uniformly considered the jury as the only judges of the law and of the fact; and that at this stage of the trial, he would plead upon no point which might preclude the determination of the jury by a previous decision of the Court." It may be that he received some consolation from the recital of these fine flowing periods, the meaning of which it is somewhat difficult at first for a nineteenth century intellect to grasp; but whether Mr. Muir's uniform view of the province of the jury was right or wrong, there seems no doubt of this somewhat startling fact, that he elected to go to trial under an indictment which *in gremio* sets forth no offence whatever, nominate or innominate, against the laws of this or any other well-governed realm.

The judges, however, thought differently; and the indictment was duly found relevant to infer the pains of law. Whereupon Mr. Muir made another speech. This was a sort of preliminary flourish of trumpets by way of backing up his defences, previously lodged; and the enthusiastic publisher—

who, by the way, dates the Preface from the Tolbooth Prison, Edinburgh—prints some of it in capital letters, after the manner of indictments in criminal courts, before everything, capital letters included, was left to be inferred by Act of Parliament.

“Knowledge,” he said (in capitals), “must always precede Reformation” (also in capitals), “and who shall Dare” (in capitals again) “to say that the People” (once more) “should be debarred from Information” (as before) “where it concerns them so materially?” Evidently no one dared; and the orator proceeded in ordinary type, “I am accused of sedition” (he had found it out), “and yet I can prove by thousands of witnesses that I warned the people of the danger of that crime, exhorted them to adopt none but measures that were constitutional, and entreated them to connect liberty with knowledge, and both with morality. This is what I can prove. If these are crimes, I am guilty.”

It would have been quite consistent with the whole proceedings if the prisoner had been at once condemned in terms of his own confession. This does not seem to have occurred to any one at the time, however; and a jury was empanelled.

Then there arose a hitch; and Mr. Muir spoke again. Five gentlemen had been selected from the list of Assize by the Lord Justice-Clerk, when it appeared that they were all members of an association calling itself “Friends of the Constitution,” united to support it against Republicans and Levellers. Mr. Muir, on the other hand, belonged to a society called “The Friends of the People,” also, as he maintained, desirous of upholding the Constitution, but at the same time anxious for parliamentary reform. The Friends of the Constitution held their meetings at the Goldsmiths’ Hall; and as their books were open to all, Mr. Muir and some of his associates had inscribed their names therein; whereupon the constitutional goldsmiths had, with a promptitude worthy of a metropolitan Town Council, erased them. Consequently he objected, reasonably enough, for the space of two and a half close pages of print, to be tried by the erasers.

Then the Solicitor-General warmly replied that with equal propriety might the panel object to their lordships on the

bench ; and really there seems to have been a good deal of truth in the observation.

Mr. Muir spoke again, but without effect. Nevertheless "he continued to repeat his objection as every five were sworn." Nor was this all ; for, after they were all sworn, he was at it again : "They had already determined his fate. They had already judged his cause ; and, as they valued their reputation, their own internal peace, he entreated"— But here even Scottish judicial patience could stand it no longer ; and Mr. Muir was suppressed.

Then followed the evidence, interspersed occasionally by a few remarks from Muir.

The first witness, who was strenuously objected to by the prisoner,—though for what reason one fails to see,—is so typical of all that follow, that he may be quoted almost in *extenso*.

"*Alexander Johnston deposes*: That he was present at a meeting in Kirkintilloch some time in the month of November last, since known by the name of a reform meeting. Mr. Muir was present, and harangued the meeting."—Harangued is good.—"As far as he recollects Mr. Muir addressed the president"—(shame !)—"stated the disadvantages in the representation, some burghs being rotten, and others having no vote. He stated the population of England and Scotland, and mentioned that from the smallness of the number who voted the people were not fully represented. . . . That a manufacturer in this country could not bring his goods to market with the same advantage as the French manufacturers. Mr. Muir said . . . that the sole intention of these societies was to procure a more equal and shorter duration of Parliament. That the means for these ends was to petition Parliament, to communicate their resolutions, and extend their knowledge by publishing and circulating useful publications."

This, let it be remembered, was the evidence for the prosecution ; and in the whole 150 pages of the trial there is really nothing stronger. And on evidence such as that, Mr. Muir was convicted of sedition.

The next incident of note was the conduct of a gentleman of the name of William Muir, who belonged to a religious sect called The Mountain, and who refused "to wrong his own

conscience by taking an oath which he thought unlawful." In vain the judges quoted Scripture for their own purposes to this refractory witness. He remained as immovable as the name of his religious persuasion. Though sworn at, he refused to swear. So "the Lord Advocate moved that this person be committed to prison for his contumacy, informed that there was no way by which he could ever be set free, and in express words declared that his imprisonment would be *eternal*." Of course this was an opportunity for speech-making, which the prisoner could not resist; but although he offered to accept the Mountaineer's testimony unsworn, without objection, the Court granted the motion of the Lord Advocate!

Though Muir might declare
 "He'd be d—d if he'd swear,"

Said the Court, "He'd be d—d if he wouldn't."

The following rather quaint note in reference to the incident is to be found in the second volume of Hume, p. 377: "In the course of the trial, and after he had been in gaol for awhile, this man's scruples gave way; and, being brought back into Court, at his own request he took the oath and was examined. *He might otherwise have remained a prisoner for some considerable time.*"

By this time the judges seem quite to have got their backs up; and, like the magistrate in "Oliver Twist," having committed *themselves* so deeply, were quite prepared to commit everybody else upon the smallest provocation. The next victim was a witness for the prisoner, by name John Russell, who, after being sworn, was asked—as was then customary—if any one had instructed him what to say. He answered: "None, except to tell the truth." This, of course, roused the whole pack of bloodhounds—no, judges!—and they were on the scent at once. "Who instructed him so? Where was his summons as a witness? Only four days since he received it, so he must remember who it was that committed the terrible offence of advising him to speak the truth. Now, sir, come away!" "The witness replied," says the sagacious chronicler, "that the general instruction *to speak the truth* was so common, that he could not remember at present any particular person who had given it." Really! this was too

incredible; and the Lord Advocate, honest man, moved that "this prevaricator" be committed to prison. In vain Mr. Muir lifted up his voice and orated. He was interrupted, ordered to sit down, told he had no right or title to interfere with the business; and Lord Henderland, with owl-like gravity, delivered his opinion. "Every appearance was against the witness," said his lordship—and, so far as the appearance of the Bench was concerned, the old gentleman was right for once—"he wished to conceal the truth, he merited punishment, and should be committed to prison for a certain period." Of course the others concurred, and the luckless recipient of extraneous admonition was "committed to prison for the term of three weeks, as guilty of concealing the truth upon oath."

Need we go further? What fate could a man expect at the hands of this righteous-dealing Court,—a man whose witness boldly maintained that he had been tutored to tell the truth? True it is, that twenty witnesses for the defence swore that the prisoner had ever advised moderate counsels, that he had dissuaded from violence, that he had always advised the people that the only method by which they might obtain reform was respectfully to petition Parliament; but if one witness had been warned to be truthful in the witness-box, why not twenty? True it is that the witnesses for the Crown were not one whit more emphatic than those in exculpation; but was not the prisoner a friend of the people? Was not the Constitution in danger? Was not Revolution rampant in France? and had not the prisoner just come from that bloody land? "Who could believe," said the Lord Advocate, in a burst of honest enthusiasm, "that a man of liberal education, an advocate at this bar, could be found among villagers and manufacturers, poor and ignorant, for the purpose of sowing sedition and discontent."

Let us pass over the prisoner's closely-reasoned speech in defence. It is not necessary at this time of day to quote much of it. What he said then is "familiar in men's mouths as household words" to-day; and as yet one has heard of no modern trials impending. But, as a model of fair-minded and dignified oratory, of calm and dispassionate judicial reticence, commend us to the Lord Justice-Clerk's charge to the jury.

"Mr. Muir," said his lordship, "had gone about among ignorant country people, making them forget their work, and told them that a reform was absolutely necessary for preserving their liberty, which, if it had not been for him, they would never have thought was in danger. He did not doubt that this would appear to them, as it did to him, to be sedition. . . . Muir pretends to have had influence with those wretches, the leading men there (in France). And what kind of folk were they? His lordship had never liked the French all his days, but now he hated them!" At another point, we have this patriotic axiom laid down: *First*, that the British Constitution is the best that ever was since the creation of the world; and it is not possible to make it better. For is not every man secure? Does not every man reap the fruits of his own industry, and sit safely under his own fig-tree? . . . The panel's haranguing such multitudes of ignorant weavers about their grievances might have been attended with the worst consequences to the peace of the nation, and the safety of our glorious Constitution. Mr. Muir might have known that no attention could be paid to such a rabble. What right had *they* to representation? He could have told them that the Parliament would never listen to their petition. How could they think it? A Government in every country should be just like a Corporation; and in this country it is made up of the landed interest, which alone has a right to be represented. As for the rabble, who have nothing but personal property, what hold has the nation of them? What security for the payment of their taxes? They may pack up all their property on their backs and leave the country in the twinkling of an eye, but landed property cannot be removed. . . . He had not the smallest doubt that the jury were, like himself, convinced of the panel's guilt, and desired them to return such a verdict as would do them honour."

It is almost superfluous to observe, after this, that the faithful goldsmiths promptly returned a verdict which probably *did* them honour in the sight of this eminent judicial personage; and the panel was found guilty. Lord Henderland was asked to propose a punishment; and did so in a speech about our glorious Constitution, as though he were

proposing a toast. "Banishment," he observed, "would be improper, as it would only be sending to another country a man, where he might take the opportunity of exciting the same spirit of discontent, and sowing, with a plentiful hand, sedition. Whipping was too severe and disgraceful, the more especially to a man who had borne his character and rank in life. And imprisonment would be but a temporary punishment, when the prisoner would be again let loose, and so again disturb the happiness of the people. There remained but one punishment in our law, and it *wrung his very heart* to mention it, namely, *transportation*." And so the heart-wrung Henderland murmured through his tears, "Fourteen years, and no return on pain of death;" and then doubtless, like Hague's Carew, he fell flat upon the floor convulsed with grief.

Lord Swinton next took up the refrain, and really seems to have been plagiarising from a modern comic opera. His idea, like that of the Mikado, seems to have been that "the punishment should be adapted to the crime; and the question was, What was the degree of crime the panel had been guilty of?" This theme he pursues, both in English and Latin, till his learned brethren must have been very near committing him; but at length, strangely enough, he agrees with Lord Henderland. Then follow Lord Dunsinnan, Lord Abercromby, and the Lord Justice-Clerk, who all concur. But, spite of all, the prisoner has the last word; and one must acknowledge that nothing becomes him better than his death. "My Lord Justice-Clerk," he said, "I shall not animadvert upon the severity or the leniency of my sentence. Were I to be led this moment from the bar to the scaffold, I should feel the same calmness and serenity which I now do. My mind tells me that I have acted agreeably to my conscience, and that I have engaged in a good, a just, and a glorious cause—a cause which sooner or later must, and will, prevail; and, by a timely reform, save this country from destruction!"

And so ends this strange, eventful history.

It is, of course, obvious that the report is written by one who sympathises with the man, wrongfully accused and unjustly punished. The sayings and doings of his opponents and judges are doubtless exposed with a ruthless severity,

and painted in colours somewhat exaggerated. But let us make allowance for all that. Surely never in the annals of time was there such a solemn, owl-like, base travesty of justice as this! Surely never was there a record of such contemptible ferocity, such crass stupidity, such official arrogance, such overbearing insolence, such lawless and ignorant absurdity, as is set forth in the account of the prosecution, verdict, opinions, and sentence, in the case of Thomas Muir, Esq., advocate, younger of Huntershill. Conceited and self-seeking he may have been,—we do not know,—vain and foolish some of his speeches indicate that he was; but that he was the victim of fanatical terror and hatred, no enlightened Scotsman will nowadays seek to deny.

Dare we, in conclusion, point the moral? If these are *our* opinions of the methods of courts of justice in 1793, what, in the name of progress and enlightenment, will men in 1991 think of the judges of this present day?

W. D. L.

Correspondence.

(To the Editor of "*The Journal of Jurisprudence*.")

"AN UNQUALIFIED——?"

SIR,—Under this title you have an editorial in your November number, dealing with some remarks made by the Secretary of the "Hawick Advanced Liberal (Gladstonian) Association," when returning thanks for his re-election to office, in which he complained of Sheriff Boyle Hope having at the late Registration Court refused to allow him to appear as agent for his party, on the ground that he was not a qualified lawyer. You say, "The Sheriff seems to have sustained the objection—it humbly appears to us, a proper decision."

Now, with great deference, I disagree with your opinion. I think Sheriff Boyle Hope gave a wrong decision, as I believe Sheriff Mair gave in a similar case in Airdrie.

By sections 25 and 27 of the County Voters Act it is competent for any claimant or objector to appear, and be heard in the Registration Courts by his agent *or mandatory*.

By section 36 of the Burgh Registration Act, 19 & 20 Vict. c. 58, which is adapted to counties, it is provided that—“Any claim, objection, notice of appeal, or other writ, may be signed, and any proceedings under this Act may be prosecuted, by *any person as agent or mandatory* for the party thereto.”

Again, by section 22 of the Reform Act of 1868, it is provided that—“If any person whose name shall have been struck out of any register or list of voters by the Sheriff, or who shall claim or object before the Sheriff at any court, shall consider the decision of the Sheriff on his case to be erroneous in point of law, he may, either by himself, or *by some person on his behalf* in open court, require the Sheriff to state . . . a special case,” etc.

These statutory provisions for the regulation of procedure in the Registration Courts appear to me not to sustain Sheriff Boyle Hope's decision; and I am strengthened in this view by the knowledge that in many Registration Courts now, professional agents and mandatories are allowed to appear for claimants and objectors. I also believe I am right in stating that Sheriff Jameson, who now holds the judgeship next to the Supreme Court, allows any duly appointed *mandatory*, irrespective of his being “a qualified lawyer” or not, to appear in his Registration Courts.—I am, etc.,

G. J. CAMPBELL.

INVERNESS, 11th November 1891.

[We welcome the above letter from an undoubted authority on the subject, and perhaps we do not seriously differ from the view expressed. In justice to Sheriff Boyle Hope, we wish to point out an error in point of fact on which we proceeded in writing the editorial in question. It was based on a newspaper cutting (sent to us anonymously), which wrongly stated that the learned Sheriff declined to admit the *locus standi* of the Secretary merely on the ground that *he was not a qualified law agent*. We are now informed that this was not so. The Secretary, although he was actually a mandatory regularly appointed, did not mention the fact, and the Sheriff was not aware that he held any mandates. This duly appointed mandatory did not, we believe, take the trouble to satisfy the judge of his right to be heard.—ED. J. of J.]

Appointments.

SIR CHARLES PEARSON, Q.C., M.P., Lord Advocate, has been admitted a Member of Her Majesty's Privy Council.

THE Queen has been pleased to appoint Mr. Graham Murray, Advocate, M.P., Solicitor-General for Scotland, to be one of Her Majesty's Counsel learned in the law.

MR. ANDREW JAMESON, M.A., Advocate (1870), Sheriff of Ross, Cromarty, and Sutherland, has been appointed Sheriff of Perth, in room of Mr. Graham Murray, resigned.

MR. HENRY JOHNSTON, B.A., Advocate (1868), has been appointed Sheriff of Ross, Cromarty, and Sutherland.

MR. HAY SHENNAN, M.A., Advocate (1884), has been appointed Sheriff-Substitute at Lerwick, in room of Mr. D. J. Mackenzie, transferred to Wick.

THE Boundary Commissioners under the Local Government (Scotland) Act, 1889, have appointed Mr. J. J. Cook, M.A., LL.B., Advocate (1889), to be Secretary to the Commissioners, in place of Mr. Hay Shennan, resigned.

MR. CHRISTOPHER N. JOHNSTON, M.A., Advocate (1880), has been appointed Counsel for the Department of Woods and Forests in Scotland.

MR. R. FITZROY BELL, Advocate, Secretary to the Scottish Universities Commission, has been granted five months' leave of absence on the ground of ill-health. Mr. T. Clark, Advocate (1882), has been appointed interim Secretary.

Obituary.

MR. DAVID ROBERTS, S.S.C. (1873), died in Glasgow, on 17th November.

The Month.

THE first volume of *Revised Reports* aims at brevity. Here is a head-note: "Taking up dead bodies, even for the purpose of dissection, is an indictable offence." "Taking up" a dead body is surely not under all circumstances an offence.

* * *

NEW conditions are imposed upon all who accept appointments as County Court judges in England—they must reside in their districts, and must retire at seventy.

* * *

A PRISONER was brought before a Dutch justice in Eastern Pennsylvania charged with stealing. "Guilty, or not guilty?" demanded the justice. "Not guilty, your honour." "Den go away,—vat you vant here? Go apout your pishness!"—*Green Bag*.

* * *

"Deaf" Jurymen.—An amusing incident occurred at Wandsworth Prison recently during an inquest held by Mr. A. Braxton-Hicks, the mid-Surrey coroner. One of the jurymen summoned to attend the inquiry asked to be exempted on the score of deafness. The coroner, by dint of speaking loudly, asked him if he could hear the evidence, and the jurymen replied that he could not. Speaking *sotto voce* Mr. Hicks told the jurymen (who was sitting at the other end of the room) that he would be excused. He at once left his seat, and, thanking the coroner, withdrew. The coroner, laughing, said that that reminded him of a man who had been summoned, meeting his officer in the street. The officer asked him if he were going to attend the inquest, and the man, putting his hand behind his ear, said, "What did you say? I am deaf." The officer at last managed to make him hear, and on parting said softly, "Will you have a drink?" "Certainly," was the ready reply. The jurymen was summoned on the next occasion.—*Irish Law Times*.

The Bona-Fide Traveller Question.—On the 21st October, at Nantwich, there was a batch of twenty-three summonses, heard against Crewe men who had driven over to Nantwich, a distance of four miles, and obtained refreshments as *bona-fide* travellers. The magistrates said that it was the bounden duty of publicans, by inquiry, to elicit whether applicants for drink were really *bona-fide* travellers, not mere travellers for pleasure. Mr. Roundell, J.P., said that a landlord was not justified in supplying drink to people on the mere representation that they came from Crewe; he must do a great deal more than that or he laid himself open to severe punishment. The justices then interrogated the men summoned as to their object in coming to Nantwich. One said to see his father-in-law, another said for the benefit of his health, a third said to see his sweetheart, and so on. These were held to be good and sufficient grounds for applying for drink as *bona-fide* travellers, but a party of seven who drove over for pleasure only, and were supplied with refreshments, were fined 2s. 6d. and costs.

* * *

Ejusdem Generis.—The *ejusdem generis* rule—that is, the rule that general words following particular ones will be restricted to the genus to which the preceding ones belong—may often have wrought an effect contrary to what was intended. A testator, for instance, enumerates a few articles which he can recollect, and then, by some general words, hopes to sweep in a great many other things, but he is supposed in law to have referred only to those things which possess a close resemblance to what he has already described. In *In re Jones; ex parte Lloyd*, 26 N. C. 111, the bankrupt had work at a colliery and was paid according to the work he did, his earnings averaging from 25s. to 30s. a week. It was sought to make these earnings, or rather a portion of them, applicable for the benefit of his creditors, under the provisions of section 53 of the Bankruptcy Act, 1883. The first subsection relates to the appropriation of the pay or salary of officers in the army or navy, or persons engaged in the Civil Service; but the second provides that “where a bankrupt is in receipt of a salary or income other than as aforesaid, or

is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, compensation, or any part thereof, to the trustee, to be applied by him in such manner as the Court may direct." A Divisional Court, consisting of Mr. Justice Cave and Mr. Justice Charles, held that the earnings of this bankrupt, not being *ejusdem generis* with salary in the preceding part of the section, were not caught by the section. In so deciding they followed *Re Hutton; ex parte Benwell*, 54 Law J. Rep. Q. B. 53, L. R. 14 Q. B. Div. 301, where the Court of Appeal held that the fees of the well-known "bone-setter" were not a salary within the meaning of the Act. Lord Esher said: "The question is whether the income which a man earns by the exercise of his personal skill, and which is dependent upon the accident whether people come to consult him or not, and upon whether he chooses to be consulted, is income of the nature of a salary. It is only necessary to state the case to show that it is not." From these two cases it would appear that earnings must not be of uncertain amount, but must be fixed, before they can be deemed to form a salary.—*Law Journal*.



Proceedings under a Chancery Brieve.—Last month Sheriff Hamilton-Grierson, Aberdeen, and a jury of fifteen local lawyers, heard an interesting question that had been raised under the will of the late Mr. Andrew Penny of Bolivia—an Aberdeenshire man, who left this country when a poor lad, and made a fortune in the silver mines of South America. The point in dispute is one of succession. Mr. Penny died intestate. His younger brother James succeeded as heir-at-law to all his heritable property in Scotland, consisting of the estate of Park and the house No. 25 Albyn Place, Aberdeen. The deceased's widow, a native of Bolivia, whose evidence was taken on commission in Aberdeen through an interpreter, and who recently married in Aberdeen a man named Craik, has taken these steps to enforce her claim to terce. The proceedings were held under the authority of a Latin brieve obtained by Mr. J. M. I. Scott, solicitor. (Mrs.

Craik's agent), from the Scottish Chancery, which, following the old practice, had to be published at the market crosses of Stonehaven and Aberdeen. The brieve from Chancery called upon the jury to find (1) whether Mrs. Penny-Craik was married to the late Mr. Penny, and (2) whether Mr. Penny was infeft in the lands of Park, these being the two requirements to her establishing her right to the terce or a third of the rental of the lands. The defenders, the next-of-kin, were represented. After hearing evidence to prove the two points raised, the jury returned this verdict:—"The jury all in one voice, by the said Archibald Campbell, whom they had elected to be their chancellor, in respect of the proof adduced, serve and cognosce the urger to a just and reasonable terce or third part of the whole lands and others described in the said claim, wherein her husband died infeft and seized as aforesaid in common form, whereupon James M. I. Scott, solicitor in Aberdeen, asked and took instruments and acts of Court, and the Sheriff-Substitute interposes his authority in the premises, and decerns and authorises extract hereof." Mr. Scott asked the Sheriff to "ken" Mrs. Penny-Craik to the terce of Park, and suggested that the most convenient form would be that he should present a petition to his lordship, who might note that that motion was made. Sheriff Grierson acquiesced in this. The case has been appealed to the Court of Session.



Contempt of Court.—At the opening of the Appeal Court, on 26th October last, the Lord Chancellor said his brother Lindley had received a letter which he discovered referred to some case in court. The Lord Justice had not read it, and would not read it, but he mentioned the matter in order to intimate to the party who sent it that, although it would not be read until the case was over, when it was read it would be with a view of seeing whether the grossest contempt of court had not been committed in writing to a judge with reference to a case which was pending. It would then be considered what should be done if the person had been guilty of such an offence.



The Bankruptcy of Members of Parliament.—The proceedings in bankruptcy instituted, though not pressed, by Lord Salisbury against Mr. William O'Brien, M.P., revive in the recollection of students of the Constitution an almost-forgotten chapter of parliamentary privilege. An adjudication in bankruptcy of a member of Parliament now, as is well known, vacates the seat. This provision, which is the result of modern legislation, owes its origin to the fact that since the Reform Act of 1832 Parliament may be considered independent of the Crown. The House of Commons did not consent to divest itself of privileges which, however abused, were of supreme value as safeguards against the Executive Government till the Executive Government became itself the servant of the House, and through the House the servant of the people at large. "Had James I.," says Mr. Hatsell in his *Precedents*, title "Privilege," "succeeded in establishing the doctrine that persons employed in foreign embassies, sheriffs of counties, bankrupts, and persons outlawed or in execution, ought not to be elected or to retain their seats, he would soon, by one or other of these methods, have found means to withdraw from their service in that House many of its ablest members, to whose spirit and attention we at this distance of time are very much indebted for the existence of the freedom which this nation now enjoys." So far from being deprived of their seats, members of the House of Commons enjoyed in former times a complete immunity from arrest for debt and from civil suits. In 1558 there was an inquiry into a complaint that John Smith, member for Camelford, had come to the House being outlawed, and had deceived divers merchants in London, taking wares of them to the sum of £300, minding to defraud them of the same under colour of privilege. The complaint was reported to be true, and the House divided that he should be allowed his privilege—Ayes, 112; Noes, 107. The career of Mr. Asgill, who was expelled from the House of Commons in 1707, is a striking illustration of the enormous amount of fraud which could be sheltered by this immunity. Mr. Asgill was appointed executor and residuary legatee under the will of a testator (who built the New Square of Lincoln's Inn), upon the express condition that he would pay none of his debts. Asgill read the will to the assembled creditors.

"You have heard, gentlemen," he said, "the deceased's testament; I will religiously fulfil the wishes of the dead." Asgill became under this will the patron of a pocket borough, for which he sat unmolested for several sessions. When in 1699 the Commissioners for the resumption of the grants of forfeited estates went over to Ireland, Asgill repaired to that country to practise as a conveyancer. He bought there a life estate of £3000 per annum, and a seat for a nomination borough in the Irish House of Commons. In 1703 he was expelled from the Irish Parliament for the publication of an absurd treatise, entitled the *Possibility of avoiding Death*, and immediately resumed his seat in the English Parliament. In an interval of Parliament in 1707, being taken in execution, he was committed to the Fleet. When the House met he wrote to the Speaker to inform him that he was detained upon two executions. His letter was referred to a committee, and the House ordered him to be delivered out of custody by the serjeant with the mace. A few days afterwards the English House of Commons, following the Irish precedent, expelled Asgill for his obnoxious book, and thus being bereft of privilege he lingered in gaol till his death, thirty years afterwards (Townsend's *Memoirs of the House of Commons*, vol. i. pp. 322-325; vol. ii. pp. 127-129). Mr. Baring, speaking in the House of Commons in debate in 1832, cited the case of a Mr. Bourke, who, being imprisoned for debt, was returned for a pocket borough, but never took his seat. He stepped into a carriage which awaited him at the door of the gaol, started for the Continent, and never returned. This immunity extended even to the menial servants of members. The privilege was infamously abused, protections being issued by members to persons who were not in their service. In 1677 a Colonel Wanklyn was expelled for protecting from his creditors as a menial servant a Mr. Cottington, who had an income of £2000 a year, equivalent to at least £6000 a year at the present day. In 1770 a very important measure, the result of the series of conflicts with Wilkes, was carried, which enacted that every suit might at any time be brought against persons entitled to the privilege of Parliament, and, though the immunity of members of the House of Commons from arrest was expressly reserved, no such

privilege was any longer granted to their servants. In the discussion in 1832 on Mr. Baring's Bill, by which it was proposed to take away the freedom from arrest in all cases of judgment debts, Mr. Herbert contended that, inasmuch as some members had been known to be in very poor circumstances, it would, under the proposed legislation, be in the power of any Administration to immure a man of first-rate abilities by buying up his debts. The statute for the abolition of imprisonment for debt extends to the community at large a protection which was formerly an exclusive parliamentary privilege. As the law at present stands, any member who is adjudicated a bankrupt is incapacitated from sitting or voting unless the order of adjudication is annulled, or his creditors fully paid or satisfied. "It accords with our notions of political justice," says Mr. Townsend (*Memoirs of the House of Commons*, vol. i. p. 326), "that no man should sit in the House of Commons, to levy contributions on his countrymen, who has not himself the means of contributing." To secure, however, against all danger from a system of purchasing up judgments, mortgages, and incumbrances, which members, though perfectly solvent, might not be able to satisfy on a short notice, it is provided that a member adjudicated a bankrupt, although incapacitated from sitting or voting, does not vacate his seat unless after the expiration of one year from the date of the adjudication the order be not annulled, or his debts be not paid.—*Law Times*.



The Status of the Speaker of the House of Commons.—The office of Speaker is believed to be contemporary with the physical division of Parliament into two separate Houses. The ancient rolls of Parliament, however, are jejune documents; they give us in the crudest form the records of the statutes that were actually passed, omitting all matters of detail. We do not find the office of Speaker mentioned in any of those documents till the year 1376. Sir Thomas Hungerford, the first Speaker of the House of Commons whose name has been recorded, is termed on the roll of the Parliament the "parlour" or mouth of the House. This word conveys in itself an ample definition of the office,

and has been so regarded by constitutional authorities on historical occasions. At the commencement of the short Parliament of 1640, the Speaker, Mr. Serjeant Glanville, in announcing his election to Charles I., said: "Your Commons' House have chosen one of themselves to be the 'mouth,' indeed, the servant, of all the rest, to steer watchfully and prudently in all their weighty consultations and debates, to collect faithfully and readily the genuine sense of a numerous assembly, to propound the same reasonably, and to mould it into apt questions for final resolutions, and so represent them and their conclusions, their declarations and petitions, upon all urgent occasions, with truth, with right, with life, and with full advantage to your most excellent Majesty." Lenthall, the successor of Glanville in the succeeding Long Parliament, came fully up to this definition of the Speaker's duties when, in reply to Charles I.'s query as to the whereabouts of the five members, he replied: "May it please your Majesty, I have neither eyes to see nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here, and humbly beg your Majesty's pardon that I cannot give any other answer than this to what your Majesty is pleased to demand of me." Sir Thomas More, who, before he became Lord Chancellor, filled the office of Speaker of the House of Commons, took in an earlier age the same view as Glanville and Lenthall of the duties of that post. When, during his Speakership, Cardinal Wolsey came into the House of Commons with great pomp to demand a subsidy—a request which was met with absolute silence on the part of the members—More suggested, in reply, that unless all the members present could put their several thoughts into his head, he alone was unable, in so weighty a matter, to give His Grace a sufficient answer. Mr. Henry Powle, who afterwards presided over the Convention Parliament, and was Speaker for two years, from 1688 till 1690, speaking in debate in one of the Parliaments of Charles II., said: "The Speaker is called the mouth and tongue of the House, which speaks the conceptions of the mind. Not that he is to make those conceptions, but pronounce what he has in command from the House. Lenthall, upon an occasion known to most, told the late King he had neither tongue, eyes, nor ears but what

the House gave him." The duties of the Speaker's office being thus determined, the question arises, How is he to be elected? Elsynge lays it down that, in accordance with unbroken precedent from the second year of Henry IV., the Commons cannot choose their Speaker till they have first been commanded so to do by the King. Two violations of this prerogative have occurred. The Convention Parliament of 1660, which met at the Restoration, voted Sir Harbottle Grimston Speaker; and again the Convention Parliament of 1688 voted Mr. Powle Speaker. These instances, however, of apparent deviation from the stereotyped usage were due only to the necessity of the situation, the Parliaments themselves not having been convened by Royal summons. The Royal leave to elect a Speaker in 1789 in succession to Mr. Cornwall, who died during the first mental derangement of George III., was given by a legal fiction, which was denounced at the time as little short of a "fraudulent trick." Opinions differ as to whether the election of the Speaker, having been made in accordance with the Royal command, is still subject to the approval of the Crown. Sir Edward Coke, when elected in 1592, declared it to be no election "until your Majesty giveth allowance and approbation." Blackstone lays it down that the Speaker must be approved by the King. Charles II. peremptorily refused to approve of the election of Mr. Edward Seymour, who had been Speaker of a former Parliament. "It is an essential prerogative of the King," said the Lord Chancellor, in announcing the Royal disapproval of the choice of Mr. Seymour, "to refuse as well as to approve of a Speaker. The King is the best judge of men and things. He thinks fit to reserve you for other service, and to ease you of this. It is His Majesty's pleasure to discharge this choice, and accordingly of His Majesty's command I do discharge you of this place you are chosen for, and in His Majesty's name command the House of Commons to make another choice." The quarrel between the King and the House with reference to the Speaker was settled by a compromise. The right of the King, however, to exercise a veto over the Commons' choice of a Speaker was fiercely contested in debate, and has never since been exercised. The great dignity of his office confers on the Speaker a high personal status. From the period of

the Revolution he has been the First Commoner in the realm. "Ever since," says Mr. Townsend, "the statute 1 Will. & M. c. 21, the Speaker has constantly taken place next to peers of Great Britain at all times, both in and out of Parliament. In all public commissions he is so ranked, and has the precedence at the Council table as a Privy Councillor. Though on common occasions the Speaker gives place to Irish peers, and those who by courtesy take rank before some peers of the realm, as sons of dukes and marquises, yet in all commissions by Act of Parliament he is named before them, and so ought to be on all solemn and national occasions." "In 1694 it was ordered that in the procession at Queen Mary's funeral no person do intervene between the Speaker and the House of Lords" (Townsend's *Memoirs of the House of Commons*, vol. i. p. 32). By the 30 Geo. III. c. 10, the Speaker's salary is fixed at the clear yearly sum of £6000. By the same statute he is disqualified from holding any office of profit under the Crown. A more recent statute (2 & 3 Will. IV. c. 105) still further secures the dignity and independence of the Speaker by making his salary payable out of the Consolidated Fund.—*Law Times*.

Reviews.

The Law of Nuisance in Scotland. By JAMES C. C. BROWN, M.A., LL.B., Advocate. Edinburgh: William Green & Sons. 1891.

IN these days of competition, when every statute of importance is annotated before it is passed, and every junior at the bar is fired with the ambition to improve by shortening, lengthening, or remodelling the too recondite or too antiquated pages of some learned senior, we should have expected that long ere this a book-hunter of keener scent than his fellows would have discovered the attractive subject of nuisance, and secured it as his own prey. No doubt the Professor of Scots Law has devoted a chapter of his treatise on Landownership to the Law of Nuisance, as limiting the natural right of property, and we have more than one com-

mentary on the Public Health Acts ; but the law of nuisance in Scotland as a subject by itself, recognised and regulated both by common law and by statute, has been treated of for the first time in the small volume before us.

It is a modest work, but its preparation must have involved much more trouble than the number of its pages at first sight suggests, and it reflects credit alike upon the author and the publishers. Many and various must have been the statutes examined, and the condensed narratives of the cases introduced by way of illustration can only be the result of careful and painstaking study, while the arrangement and printing are all that can be desired. The author's style is simple, indicating a thorough grasp of his subject, which is clearly and logically set forth. The decisions referred to and explained are throughout regarded in the light of valuable expositions of the principles of law involved, rather than as a useful list of reported precedents. The book is certainly not spoilt by the lack of a proper index ; but so copious an index at the end, and such a full outline of the contents of the various chapters at the beginning—although both reveal much trouble and discriminating care—would, if introduced upon the same scale, unduly encumber any work of greater size. It is possible to have too much of a good thing, although that may be better than too little. As to whether the separation of the lists of English and Scotch cases may not one day prove a trap for some hasty consulter of authorities, unaware of the double collection, it would be premature to hazard an opinion.

The chapters upon Legal Procedure, upon Valid and Invalid Defences to an action of Nuisance, and upon protective stipulations in title-deeds, will be among those most interesting to the legal profession ; but we have here an exceedingly readable book, which ought to be found interesting by many beyond that charmed circle.

Has not every one got a grievance, and to how many does it not take the form of what they think is a nuisance ? Has the neighbourhood become less select because of its increased educational advantages, or do the horses in the lane behind cause annoyance to some nervous and irritable old gentleman fond of a morning dose and a late breakfast ? Before any

fashionable lady or crotchety bachelor brings an interdict against school or horse-dealer, let them pause and peruse Mr. Brown's volume, which will explain to them that, although probably they know the maxim, "*Sic utere tuo ut alienum non lædas*," they must extend their knowledge of latinity, and learn that "*lex non favet delicatorem votis*."

A Treatise on the Rights and Burdens incident to the Ownership of Lands and other Heritages in Scotland. By JOHN RANKINE, M.A., Advocate, Professor of Scots Law in the University of Edinburgh; Author of *The Law of Leases in Scotland*. Third Edition. Edinburgh: Bell & Bradfute. 1891.

PROFESSOR RANKINE'S treatise has become indispensable to practitioners and to students; and if one is fortunate enough to have begun to make acquaintance with Scots Law no earlier than 1879, one wonders what lawyers did in the days when there was no such systematic work. There is no need in 1891 to discuss its unquestioned merits—its author's thorough and extensive knowledge, and his power of singularly clear expression—or the great usefulness of the book. Since the publication of the second edition in 1883, there have, of course, been considerable growth and change in the matters which form the subject of so comprehensive a work, and a new edition has become necessary. This edition is appreciably enlarged.

A Digest of Decisions in Scottish Shipping Cases, 1865–90. With Notes. By WILLIAM GEORGE BLACK, Member of the Faculty of Procurators, Glasgow; Author of *The Law relating to Scottish County Councils*, etc. Edinburgh: Green & Sons. 1891.

THE idea of such a work as this, if well carried out, is excellent. Mr. Black has carried out his idea well. The

book must prove very useful. The decisions on this important branch of the law have been skilfully digested, and the arrangement of the subject also is to be commended. The cases in the first chapter refer to the ships—the contract to build, payment by instalments, sale to a foreigner, repairs, lien, survey, ship-measurement, Lloyd's Register, etc. The owners, managing owner, shipmaster, and seamen are the subjects of the second chapter. The contract of affreightment that of the third. Collision, and salvage and towage, are dealt with in chapters IV. and V. respectively; marine insurance in chapter VI.; harbours, etc., in chapter VII.; and the last chapter includes arrestment, evidence, and foreign law. The usefulness of the book is greatly increased by that most important addition to any work of the kind, to wit, a good index.

English Decisions.

OCTOBER—NOVEMBER.

(All current English decisions likely to throw light upon any point of Scottish law or practice are here reported.)

MASTER AND SERVANT.—*Grocer's assistant*—"Workman"—38 & 39 Vict. c. 90, sec. 10.—The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), after giving justices jurisdiction to hear and determine disputes between employers and workmen, enacts by sec. 10 that "the expression 'workman' does not include a domestic or menial servant, but save as aforesaid means any person who being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, has" . . . The respondent, a grocer, laid a complaint against the appellant, an assistant in his employ, before a Court of summary jurisdiction, for leaving his service without notice. The real and substantial duties of the appellant were to sell the goods in the shop to customers; he also made up parcels, and carried small parcels to the cart at the door; but a porter was kept to do the heavy manual labour. The justices held that the appellant was a "workman" within the meaning of the Employers and Workmen Act, 1875. On appeal to the Queen's Bench Division, Mr. Justice Smith held that the appellant was not a "workman;" Mr. Justice Grantham held that the justices were right in holding that he was. *Held* (by the Master of the

Rolls, and Lords Justices Fry and Lopes), that this grocer's assistant was not a "workman" within the meaning of the Act.—*Bound v. Lawrence*, Ct. of App., October 27.

MARKET OVERT.—*Custom—Shop—Showroom upstairs—Sale by customer to shopkeeper.*—The plaintiff sought to recover certain jewellery which had been sold by a third party to the defendants, who were goldsmiths, carrying on business in the city of London. It appeared from the evidence that a lady came to the shop of the defendants, and offered to sell the jewellery to them. Defendants took her upstairs to a showroom, and after examining the jewellery, they agreed to purchase it from her. It subsequently transpired that this was jewellery which had been stolen from the plaintiff. On behalf of the defendants, it was contended that, by the custom of the city of London, their premises were market overt for the sale of jewellery, and that, as they had bought the jewellery in question in market overt, they had a good title to it against the plaintiff. *Held* (by Mr. Justice Wills), that the sale, having taken place in the showroom upstairs, and not in the shop itself, was not a sale in market overt. *Semble*, that a sale by a customer to a shopkeeper in the city of London of goods of the description in which the shopkeeper usually deals, is not a sale in market overt.—*Hargreave v. Spink*, High Ct., Q. B. Div., November 2.

JUSTICES.—*Disqualification—Pecuniary interest.*—This was a rule for a *certiorari* to bring up and quash an order of a magistrate on the ground that he was interested in the matter of the summons. Heaps of manure were deposited on some waste land in a parish in Sussex. The surveyor of highways called a meeting of ratepayers to consider the habit of depositing the manure heaps. The magistrate in question was a ratepayer attending the meeting, and he moved a resolution calling upon all those who deposited the heaps of manure to remove them. Every one complied with the resolution except the appellant, who was thereupon summoned before the Petty Sessions, where the magistrate in question was sitting as magistrate, and an order was made calling upon the appellant to remove the remaining heaps. The proceedings before the magistrates were instituted by the surveyor of highways. It was contended on behalf of the magistrate that his interest as a ratepayer was infinitesimal, and that the surveyor of highways could have acted without calling the vestry meeting. *Held* (by Mr. Justice Mathew and Mr. Justice Smith), that the rule must be made absolute—first, because the magistrate in question took a part in originating the proceedings, and therefore came within the rule as to bias; and secondly, he had a pecuniary interest as a ratepayer.—*Reg. v. Guisford*, High Ct., Q. B. Div., November 3.

COMPANY.—*Memorandum of Association—Alteration of objects—Sanction of Court—Conditions—Alteration in name of company—Com-*

panies (Memorandum of Association) Act, 1890, 53 & 54 Vict. c. 62, sec. 1 (5) (d).—The deed of settlement of a marine assurance company, which had been subsequently to its formation registered under the Companies Acts, 1862 to 1880, provided that the object and business of the company should be to grant or effect assurance on British and foreign ships, and goods and merchandises at sea or going to sea, and on freight, against the perils and damages of the sea, and all other marine risks, and to lend money on bottomry and respondentia. The business of underwriters and marine assurance companies having become of late years considerably extended, so as to include the assurance of many other risks than those enumerated in the company's deed of settlement, and also the assurance of warehouses, and the goods therein, and other property connected with shipping, and life and accident assurance, in connection with transit by sea and land, the company passed a special resolution to alter the objects of the company so as to include these additional businesses. Upon an application to the Court to confirm this resolution: *held* (by Mr. Justice Kekewich), that the additional businesses were such as might be conveniently or advantageously combined with the present business of the company, and that the resolution should therefore be confirmed; that the order must be subject to an alteration in the name of the company, so that the public might be made aware of the extension of its business.—*Re The Alliance Marine Assurance Co. Ltd.*, High Ct., Ch. Div., November 7.

TRADE MARK.—*Fancy word—Patents, Designs, and Trade Marks Act, 1883, sec. 64, sub-sec. 1 (c).*—In June 1886 the plaintiffs, who were soap manufacturers at Wakefield, registered, under the Patents, Designs, and Trade Marks Act, 1883, as a trade mark, not used by them before August 1875, the word "Britannia," in class 48, for perfumery, including, amongst other things, perfumed soap. The plaintiffs alleged that the defendants had infringed their registered trade mark, and moved for an injunction. The defendants contended that the word "Britannia" was not a distinctive fancy word not in common use, and moved to have the register rectified by expunging the registration of the mark. *Held* (by Mr. Justice Chitty), that the word "Britannia" ought to be taken in its primary sense as a geographical name, and was not a "fancy word," and that, even if taken in a secondary sense as denoting a symbolical personage, it would not be a "fancy word;" and the mark ordered to be removed from the register.—*Hodgson v. Sindair*, High Ct., Ch. Div., November 10.

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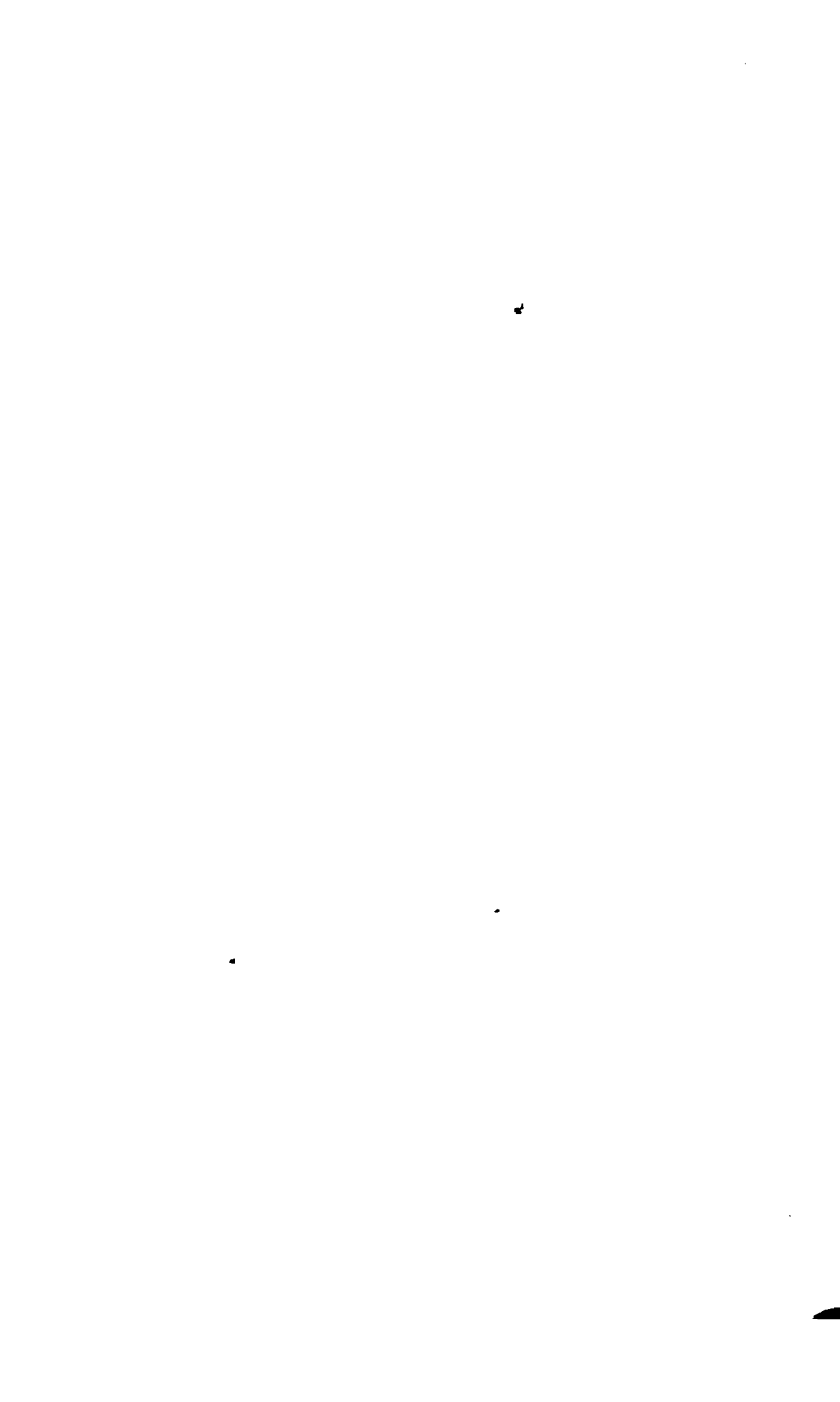
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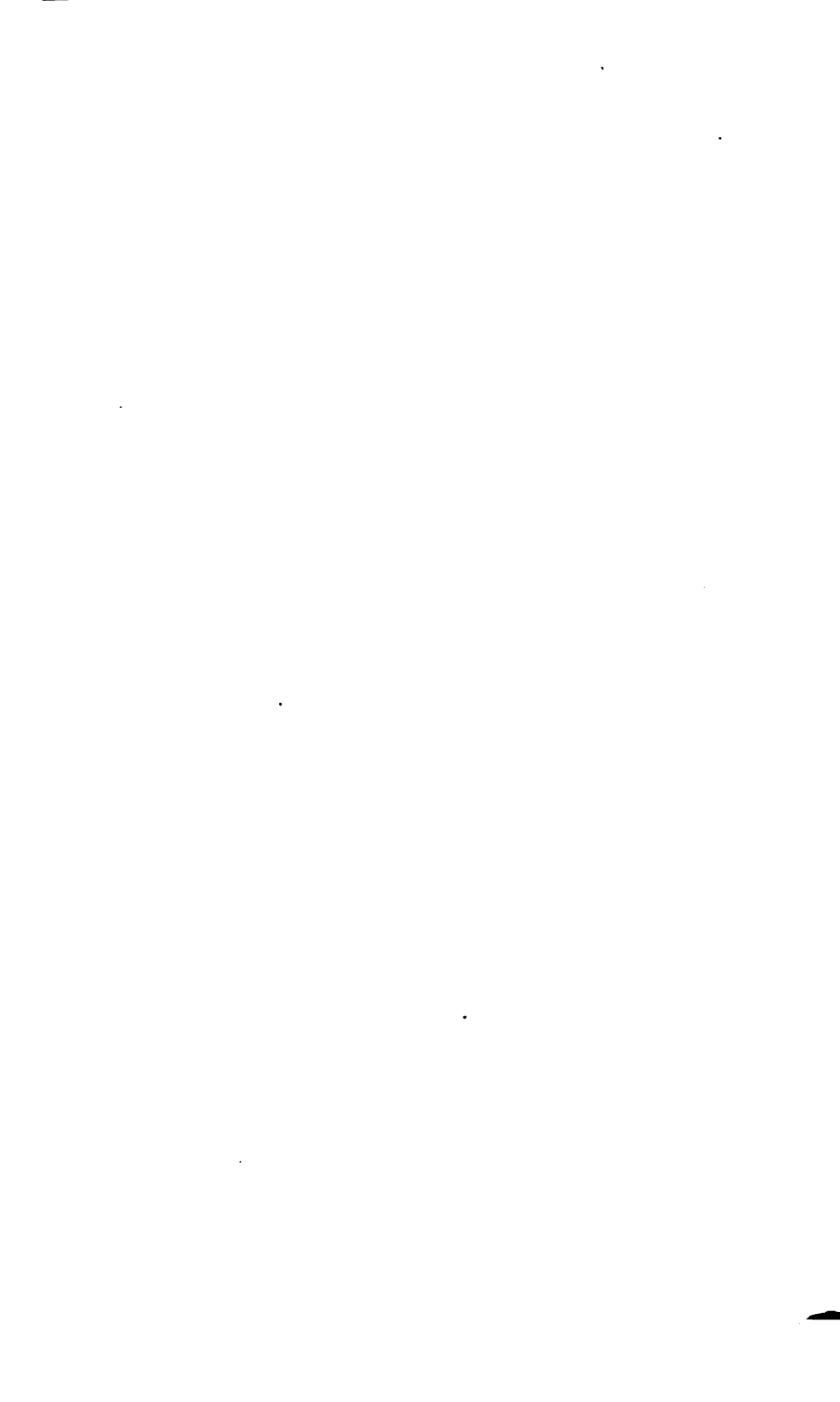
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